No. _____

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOR THE SIXTH APPELLATE DISTRICT

SAN JOSE POLICE OFFICERS' ASSOCIATION,
Petitioner,

vs.

SANTA CLARA COUNTY SUPERIOR COURT,
Respondent;

CITY OF SAN JOSE,
Real Party In Interest.

From an Order of the Honorable Peter H. Kirwan, Dept. 8
Santa Clara Civil Case No. 1-12-CV-225926

PETITION FOR WRIT OF MANDATE, PROHIBITION, OR OTHER APPROPRIATE RELIEF; AND SUPPORTING EXHIBITS

Gregg McLean Adam, No. 203436
Jonathan Yank, No. 215495
Gonzalo C. Martinez, No. 231724
CARROLL, BURDICK & McDONOUGH LLP
44 Montgomery Street, Suite 400
San Francisco, CA 94104
Telephone: 415.989.5900
Facsimile: 415.989.0932
Email: gadam@cbmlaw.com

Attorneys for Petitioner SAN JOSE POLICE OFFICERS' ASSOCIATION ("SJPOA")

TO BE FILED IN THE COURT OF APPEAL

APP-008

COURT OF APPEAL, SIXTH APPELLATE DISTRICT, DIVISION	Court of Appeal Case Number:
ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address):* Gregg M. Adam, # 203436; Jonathan Yank, #215495; Gonzalo C. Martinez #231724 CARROLL, BURDICK & McDONOUGH LLP 44 Montgomery Street, Suite 400 San Francisco, CA 94104 TELEPHONE NO.: 415-989-5900 FAX NO. *(Optional):* 415.989.0932 E-MAIL ADDRESS *(Optional):* gadam@cbmlaw.com ATTORNEY FOR *(Name):* Petitioner San Jose Police Officers' Association	Superior Court Case Number: 1-12-CV-225926 ***FOR COURT USE ONLY***
APPELLANT/PETITIONER: San Jose Police Officers' Association RESPONDENT/REAL PARTY IN INTEREST: Santa Clara County Superior Court	
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS *(Check one):* ☑ INITIAL CERTIFICATE ☐ SUPPLEMENTAL CERTIFICATE	

Notice: Please read rules 8.208 and 8.488 before completing this form. You may use this form for the initial certificate in an appeal when you file your brief or a prebriefing motion, application, or opposition to such a motion or application in the Court of Appeal, and when you file a petition for an extraordinary writ. You may also use this form as a supplemental certificate when you learn of changed or additional information that must be disclosed.

1. This form is being submitted on behalf of the following party (*name*): San Jose Police Officers' Association

2. a. ☑ There are no interested entities or persons that must be listed in this certificate under rule 8.208.

   b. ☐ Interested entities or persons required to be listed under rule 8.208 are as follows:

Full name of interested entity or person	Nature of interest *(Explain):*
(1)	
(2)	
(3)	
(4)	
(5)	

☐ Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: February 21, 2013

Gregg McLean Adam
(TYPE OR PRINT NAME)

▶ _____
(SIGNATURE OF PARTY OR ATTORNEY)

Form Approved for Optional Use
Judicial Council of California
APP-008 [Rev. January 1, 2009]

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Cal. Rules of Court, rules 8.208, 8.488
www.courtinfo.ca.gov

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page

State Cases

TABLE OF AUTHORITIES
(continued)

Page

State Statutes

TABLE OF AUTHORITIES
(continued)

Page

Other Authorities

I

A SUMMARY OF THIS PETITION: WHAT WENT WRONG, AND WHY AN APPEAL IS NO REMEDY

This case involves a challenge to the City of San Jose's Measure B, which amended the city charter in ways detrimental to Petitioner's members, including authorizing the City to unilaterally decrease police officers' contractual salaries by as much 16%. Petitioner filed a lawsuit alleging Measure B violated, among other things, the City's collective bargaining obligations under the Myers-Milias-Brown Act (California Government Code § 3500 *et seq*.) ("MMBA"). Following overbroad dicta in a leading case, Respondent dismissed that claim with prejudice and without leave to amend, finding that Petitioner's only remedy was an action in quo warranto.

Quo warranto is an ancient and limited procedure belonging to the State designed, among other things, for challenges to *the process by which* charter amendments are enacted. Because quo warranto implicates the State's sovereign authority, it can only be brought by the Attorney General or with her consent. Indeed, Petitioner separately sought the Attorney General's permission to bring such a suit challenging the process by which Measure B was put on the ballot. Quo warranto, however, does not apply to lawsuits challenging the legal effect or substantive legality of charter amendments—such as that brought by Petitioner here.

Writ relief from this Court is necessary for at least two reasons. First, Respondent's ruling left SJPOA's claim in a procedural limbo: Respondent barred the MMBA claim from proceeding in superior court, and its decision thus leaves Petitioner without a forum because its substantive challenge, strictly speaking, does not fit within the quo warranto doctrine. Indeed, the Attorney General recently confirmed that SJPOA's procedural and substantive challenges to Measure B are "separate and distinct." (Ex. 22.) Further, in another case, she recently denied leave to sue in quo warranto to a union which brought substantive challenges to a charter amendment. In sum, Respondent left SJPOA with no ability to enforce the MMBA's bargaining obligations as Measure B is applied to its members.

Second, this Court's guidance is necessary because, although the quo warranto procedure is very narrow, cases applying that doctrine express its applicability in unintentionally broad terms. That conflict between imprecise dicta and the core holdings in quo warranto cases has serious consequences for litigants (whose meritorious claims are barred), our courts (who are led astray by imprecise formulations of the legal standard), and the Attorney General (who is charged with assessing and bringing quo warranto actions). Indeed, Respondent was misled by such dicta and

refused to give SJPOA leave to amend its complaint, expressly finding that quo warranto is the union's only remedy.[1] Yet, the Attorney General subsequently confirmed SJPOA's two challenges to Measure B were not the same.

This Court should grant the Petition to give SJPOA an opportunity to have its claim heard on the merits and to provide necessary guidance regarding the true scope of quo warranto actions.

II

THE PETITION

1. Petitioner San Jose Police Officers' Association ("SJPOA") is a California nonprofit unincorporated labor association representing over a thousand police officers employed by the City of San Jose.

2. SJPOA is a plaintiff in an action now pending in the Respondent court entitled *San Jose Police Officers' Association v. City of San Jose, et al.*, Santa Clara Superior Court No. 12-cv-225926. (Ex. 1.)

---

[1] Numerous published cases involving *purely* procedural challenges are drafted in unwittingly broad language. (See, e.g., *International Assn. of Fire Fighters v. City of Oakland* (1985) 174 Cal.App.3d 687, 698 ["an action in the nature of quo warranto constitutes the exclusive method for appellants to mount their attack on the charter amendments based upon the city's failure to comply with the Meyers-Milias-Brown Act"]; *County of Santa Clara v. Hayes Co.* (1954) 43 Cal.2d 615, 618 ["Once the charter had been put into effect, however, it could only be attacked in quo warranto proceedings"]; *Oakland Municipal Improvement League v. Oakland* (1972) 23 Cal.App.3d 165, 168 [same]; *People ex rel. Kerr v. County of Orange* (2003) 106 Cal.App.4th 914, 919-920 fn.3 [quo warranto "is tailor-made for legal inquiries as to the validity of a county charter"].)

3. Respondent is the Superior Court of the State of California for the County of Santa Clara. (Exs. 1, 19.)

4. Real Party in Interest is the City of San Jose ("City") a charter city that employs the members of SJPOA. The City is governed by the San Jose City Charter ("Charter") and by superseding state law. Labor-management relations between SJPOA and the City are governed by the MMBA. (Ex. 1.)

A. SJPOA Challenged the *Substantive* Legality of Measure B in its Complaint; It Challenged the *Procedural* Validity of Measure B's Enactment in its Quo Warranto Application With the Attorney General

5. On June 5, 2012, the San Jose electorate enacted Measure B, which amended provisions of the San Jose City Charter governing pension and salary rights in ways detrimental to SJPOA's members. The City Council placed Measure B on the ballot. (*Ibid*.)

6. The day after the election, Petitioner filed a complaint alleging, among other things, that certain provisions of Measure B violated the City's collective bargaining obligations under the MMBA (Seventh Cause of Action) and breached the parties' existing collective bargaining agreement (Sixth Cause of Action). SJPOA amended its complaint on July

5 to amend its allegations as to an unrelated party; the operative complaint is the First Amended Complaint ("FAC"). (Ex. 1).[2]

7. Several other unions representing City employees filed lawsuits challenging Measure B (although none brought an MMBA claim). These cases were consolidated for pre-trial purposes, with SJPOA's case serving as the lead case. (Ex. 3.)

8. SJPOA challenged the substantive content of the following provisions of Measure B under the MMBA:

a. Section 1506-A, which directed that police officers' existing contractual salaries be cut by as much as 16% "without requiring the City to bargain over such reductions" and that even if bargaining were to take place it would be meaningless because "the amount of salary reductions [is] non-negotiable." (Ex. 1 [FAC ¶ 105]; see also *id*. ¶¶ 37-38 and 40-48.) These allegations also support a claim of violation of the MMBA as to future contracts because Measure B would make the meet and confer process meaningless. (See *id*. ¶¶ 105-106.)

b. Section 1512-A, which will effectively reduce existing contractual salaries by requiring employees to pay more for retiree healthcare benefits. (*Id*. ¶¶ 106, 56-57.)

---

[2] Unrelated to this Petition, SJPOA also alleged Measure B violated numerous state constitutional provisions (the contracts clause, the takings clause, due process, the right to petition, the separation of powers doctrine, and the California Pension Protection Act). (*Ibid*.)

c. The complaint also alleged that Section 1514-A violated the MMBA because it too directs that the salary reductions in Section 1506-A "shall" be enforced if Section 1506-A itself is declared unlawful, without any obligation to bargain over the reductions themselves or their amount. (See *id.* ¶¶ 60, 103; Ex. 7 [City's RJN Ex. A, at p. 16 [Section 1514-A]].)

9. SJPOA's lawsuit did not challenge the manner by which Measure B was enacted or otherwise placed on the ballot. Further, SJPOA's prayer asked the court to declare that Measure B could not be applied to its members, but did not ask it to find that Measure B's enactment was itself void. (See Ex. 1, generally and at p. 24.)

10. Instead, SJPOA separately challenged the procedural regularity of Measure B's enactment in a quo warranto application submitted to the California Attorney General on June 21, 2012. That application did *not* challenge the substantive validity of Measure B under the MMBA (the subject matter of the FAC). Instead, it alleged the City failed to satisfy its bargaining obligations *before* placing Measure B on the ballot. That application remains pending before the Attorney General. (Exs. 8-11.)

11. The City did not file a demurrer or motion to dismiss and instead it answered the FAC on August 6, 2012. It did not aver that the present action was barred by quo warranto. (Ex. 2.)

B. The City's Motion for Judgment on the Pleadings; Respondent's Tentative Order Granting Leave to Amend and Subsequent Dismissal With Prejudice

12. The City filed a motion for judgment on the pleadings on November 28, 2012 against the MMBA claim. It primarily argued that the MMBA did not contain substantive requirements and that its only duty under that statute was to meet-and-confer before placing Measure B on the ballot. It further argued dismissal was warranted because quo warranto was the sole legal avenue to pursue SJPOA's MMBA claims, conflating the bargaining process necessary to put Measure B on the ballot with that necessary before Measure B could be applied to SJPOA. (The notice, amended notice and memorandum of points and authorities, and request for judicial notice are Exhibits 4 to 13.)[3]

13. SJPOA opposed the City's motion on January 15, 2013. It argued the quo warranto proceeding was unrelated and not a proper basis for dismissal because the FAC did not allege an MMBA violation based on Measure B's enactment. SJPOA further argued the MMBA claim was sufficiently pled because (a) it alleged facts that Measure B itself violated the City's meet-and-confer duty as to the parties' existing contract and future contracts; (b) city charters could not trump state collective

[3] The City subsequently filed a second motion for judgment on the pleadings against certain constitutional claims that is not at issue here. The parties agreed to a joint hearing on the City's motions to align the briefing schedules.

bargaining laws; and (c) the City had a continuing duty to meet and confer even after Measure B was enacted. (Ex. 14.) It objected to consideration of its quo warranto filings as a basis to dismiss. (Ex. 15.)

14. SJPOA requested leave to amend to the extent Respondent found any deficiency. Specifically, it offered to include more specific allegations regarding Section 1514-A and to clarify that while SJPOA's lawsuit "is directed at Measure B's infringement on the MMBA's meet and confer *process*" as the City imposed Measure B on its members, the union's challenge was "*not* 'procedural' in the manner urged by the City—i.e., the FAC does *not* challenge the manner in which Measure B was put on the ballot." (Ex. 14 at fn.8, emphasis original; see also *id.* at fn.2, 4 and p. 10.) It acknowledged its pleading might be "inartful[]" on this point. (*Id.*)

15. On reply, the City insisted that the "only possible MMBA claim" is "that the City failed to adequately meet and confer *before* placing Measure B on the ballot" (Ex. 16 at 2)—ignoring the FAC's allegations and SJPOA's opposition arguments. For the first time, it also argued SJPOA's challenge as to future contract negotiations was "unripe" even though it acknowledged the parties' collective bargaining agreement would expire on June 20, 2013, presumably requiring imminent negotiations for a successor contract. (Compare Ex. 16 at pp. 3, 8.)

16. On January 28, the Respondent court, Hon. Peter H. Kirwan presiding, issued a tentative order granting the City's motion as to

the MMBA claim, but giving SJPOA leave to amend. (Respondent denied in full the City's motion against SJPOA's constitutional claims.)

17. Respondent heard argument the next day. Exhibit 18 is a true copy of the original reporter's transcript of the January 29, 2013 hearing on Real Party in Interest City of San Jose's Motion for Judgment on the Pleadings.

18. SJPOA argued its lawsuit was a substantive and not procedural challenge to Measure B. (Ex. 18 [RT 5:22-6:17; 8:7-12].) Respondent, however, believed that was "a distinction without a difference." (*Id*. at 6:19.) SJPOA argued the distinction did matter because, if dismissed, its MMBA claim would have no forum and "find itself in a no man's land." (*Id*. at 8:21.) It suggested further briefing may be necessary (*id*. 8:17-20), and urged Respondent to examine a recent Attorney General Opinion, No. 12-203, not cited in the briefs. (*Id*. 6:26-7:28.)

19. The City broadly argued that "[q]uo warranto is the only remedy for the alleged violation of the MMBA in connection with a charter amendment" and that "there is no other remedy out there." (*Id*. at 10:15-17, 21.) It further argued that SJPOA was attempting to "create a new cause of action" because the only remedy for *any* MMBA challenge to charter amendments is purportedly quo warranto. (*Id*. at 10:23-25.) It thus urged SJPOA should not have leave to amend because there was no "basis for

them to be able to amend their complaint to get out of quo warranto." (*Id*. at 11:13-15.) Finally, as to Attorney General Opinion No. 12-203, counsel for the City stated she "now had a chance to look at it and there is absolutely nothing new in the AG opinion." (*Id*. at 21:12-14.)

20. Respondent took the matter under submission, expressing some concern the City did not calendar the motion as a special procedure, which would have accorded the parties and the Court more time. (*Id*. at 4:4-11; 13:16-21; 21:4-11, 21-26.)

21. On January 30, SJPOA notified Respondent it was prepared to accept the tentative ruling because leave to amend would allow it to clarify the MMBA allegations and give the City an additional opportunity to challenge such allegations.

22. On February 1, Respondent issued its order dismissing the MMBA claim "WITHOUT LEAVE TO AMEND." (That ruling was served by mail and not received until February 4.) Respondent quoted certain broad language from a First District case stating that "[A]n action in the nature of *quo warranto* constitutes the exclusive method for appellants to mount their attack on the charter amendments based upon the city's failure to comply with the Meyers-Milias-Brown Act." (Ex. 19, quoting *International Assn. of Fire Fighters v. City of Oakland* (1985) 174 Cal.App.3d 687, 698.) It also cited a different Attorney General Opinion involving a procedural challenge to charter amendments. (*Id*., citing 95

Ops. Cal. Atty. Gen. 31.) It did not cite or rely on Attorney General Opinion No. 12-203. (See *id*.)

23. Respondent acknowledged that SJPOA argued its Seventh Cause of Action was for a substantive violation of the MMBA and thus quo warranto did not apply. Nevertheless, it "respectfully disagree[d]" and held that SJPOA's claim "alleges a ***procedural*** violation of the Meyers-Milias-Brown Act, both ripe and unripe." (*Id*., emphases original.) It did not explain its reasoning for that conclusion or why SJPOA was foreclosed from alleging facts in an amended complaint that stated a claim for substantive violation of the MMBA.

C. The Attorney General Confirmed the Two Matters Were "Separate and Distinct" But Declined to Issue A Formal Legal Opinion

24. Respondent's ruling barred SJPOA from proceeding with its claim in superior court. Even though Respondent apparently believed Petitioner could pursue its substantive claims in quo warranto, SJPOA understood the ruling left it without a remedy at law.

25. Accordingly, as the Declaration of Gregg M. Adam explains (immediately following the Verification to this Petition), on February 5, SJPOA notified the Attorney General regarding Respondent's ruling and requested an expedited opinion letter that SJPOA's substantive claims were not barred by quo warranto for use in a reconsideration motion.

26. The Adam Declaration further attests that the Attorney General responded by letter on February 14. That letter declined to issue a formal legal opinion, but did confirm that the quo warranto matter pending before the Attorney General and the lawsuit pending before Respondent were "separate and distinct."

D. The February 26, 2013 Trial Setting Conference

27. Respondent will set this matter for trial on February 26. At the trial setting conference, SJPOA anticipates the court will set the matter for bench trial on an expedited basis and make further rulings on the scope of the claims and relevant evidence to be presented. Because Respondent dismissed SJPOA's MMBA claim with prejudice, SJPOA will be prevented from presenting any argument or evidence regarding this claim at trial.

E. Basis for Relief and Absence of Other Adequate Relief

28. This Petition asks this Court to do what the trial court erroneously refused to do; that is, deny the City's motion for judgment on the pleadings on the Seventh Cause of Action in its entirety and/or grant SJPOA leave to amend. As explained in the supporting memorandum, Respondent erred in denying that relief because the quo warranto limitation is narrow and does not apply here.

29. Without this Court's intervention, SJPOA is literally in a procedural "no man's land." Respondent's dismissal with prejudice prevents SJPOA from prosecuting its substantive MMBA claim, a

substantial portion of its case. It also leaves SJPOA no method to enforce the MMBA's bargaining obligation as Measure B is applied to police officers to, e.g., reduce their contractual salaries unilaterally by 16%. Further, because the Attorney General confirmed SJPOA's substantive and procedural challenges to Measure B were "separate and distinct," quo warranto relief is an unavailable remedy for the claim Respondent dismissed.

30. Respondent's order granting judgment on the pleadings is not appealable. (See Code of Civil Proc. § 904.1.) Relief is available only by writ petition. (*Figueroa v. Northridge Hospital Medical Center* (2005) 134 Cal.App.4th 10, 13; *Taylor v. Sup. Ct.* (1979) 24 Cal.3d 890, 894.)

31. Review of this order after final judgment is an inadequate remedy that would irreparably harm SJPOA because (1) the City will have reduced police officers' contractual salaries by as much as 16%, an amount it decided without MMBA-mandated bargaining; (2) SJPOA would be forbidden from prosecuting its substantive MMBA claim in court or from enforcing the MMBA's bargaining obligation, a substantial portion of its case. Reversal after judgment would not only require the expense of re-trial, but also leave San Jose's Police Officers vulnerable to the City's unilateral implementation of Measure B.

32. Except as specifically noted (at Petition ¶ 17 and Adam Declaration ¶¶ 3-5), all exhibits accompanying this Petition are true and correct copies of original documents on file with the Respondent court.

WHEREFORE, Petitioner SJPOA prays that this Court:

1. Issue a peremptory writ of mandate, after giving notice pursuant to *Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171, directing Respondent to (A) set aside and vacate its February 1, 2012 order, and (B) enter a new order denying the City's Motion for Judgment on the Pleadings as to the Seventh Cause of Action in its entirety, or, in the alternative, granting Petitioner leave to amend its Seventh Cause of Action; *or*

2. Issue an alternative writ directing Respondent to do those acts, or show cause why it should not be required to do so; *or*

3. Award such other and further relief as this Court may deem just and proper; and

//

//

//

//

//

//

//

4. Award Petitioner its costs in this proceeding pursuant to California Rule of Court 8.493.

Dated: February 21, 2013

Respectfully submitted,
CARROLL, BURDICK & McDONOUGH LLP

By _____
Gregg McLean Adam
Gonzalo C. Martinez
Attorneys for Petitioner
SAN JOSE POLICE OFFICERS' ASSOCIATION

III

VERIFICATION

I, Gregg M. Adam, declare as follows:

I am one of the attorneys for Petitioner San Jose Police Officers' Association in this matter. I make this verification pursuant to Code of Civil Procedure section 446 because Petitioner is located outside the City and County of San Francisco, where my office is located, and because I act as counsel for Petitioner. I have read the foregoing Petition for Writ of Mandate, Prohibition, or Other Appropriate Relief and know its contents. The facts alleged in the Petition are within my own knowledge and on that basis I allege them to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 21st day of February, 2013, at San Francisco, California.

Gregg McLean Adam

IV

DECLARATION OF GREGG M. ADAM CONCERNING ADDITIONAL FACTS SHOWING PETITIONER HAS NO REMEDY AT LAW

I, Gregg M. Adam, declare as follows:

1. I am an attorney at law licensed to practice before all the courts of the State of California. I am a partner with the law firm of Carroll, Burdick & McDonough LLP, attorneys of record for Petitioner San Jose Police Officer's Association. By virtue of that representation, I have personal knowledge of the facts set forth herein and if called as a witness I could and would testify competently as to them.

2. On February 4, I received Respondent's order denying leave to amend SJPOA's Seventh Cause of Action. That ruling left SJPOA without a remedy at law because SJPOA was barred from proceeding with its claim in superior court and SJPOA's substantive MMBA claim, strictly speaking, did not fit within the quo warranto doctrine.

3. On February 5, I wrote the Attorney General to notify her of Respondent's ruling and request an expedited opinion letter that

SJPOA's substantive claims were not barred by quo warranto. Exhibit 20 is a true and correct copy of that letter.

4. The City opposed on February 12, essentially arguing SJPOA had no standing to seek an opinion letter and that SJPOA misread Respondent's order. Exhibit 21 is a true and correct copy of that letter.

5. The Attorney General responded by letter on February 14. Although it declined to issue a formal legal opinion, the letter confirmed the quo warranto matter pending before the Attorney General and the lawsuit pending before Respondent were "separate and distinct." Specifically, it noted that the issues in the quo warranto action "involve the events surrounding the process by which . . . 'Measure B' was enacted and whether there were procedural irregularities in that process . . . . [T]he issue ruled upon by the superior court involves the legal effect, *post-enactment*, of a particular provision of Measure B. That issue is therefore separate and distinct from the matters before us" (italics original). Exhibit 22 is a true and correct copy of that letter.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 21st day of February, 2013, at San Francisco, California.

Gregg McLean Adam

V

THE QUO WARRANTO LIMITATION IS VERY NARROW AND DOES NOT APPLY HERE[4]

A. Quo Warranto Applies Only to Challenges to the Regularity of Proceedings By Which Charter Amendments Are Enacted

As relevant here, a quo warranto action is governed by three controlling principles.[5] First, because it is an action "in the name of the people of this state," it may only be brought by the Attorney General or with her consent.[6] Second, a quo warranto action challenges the unlawful exercise of a franchise, including the proceedings by which a charter city amends its charter. Third, when quo warranto applies, it is the *only*

---

[4] This Court's review of Respondent's ruling on the motion for judgment on the pleadings is *de novo*. (*North American Chemical Co. v. Sup. Ct.* (1997) 59 Cal.App.4th 764, 773 ["we examine the factual allegations of the complaint[] to determine whether they state a cause of action on *any* available legal theory. If they do, then the trial court's order of dismissal must be reversed"]; *id.* ["[w]e thus consider de novo whether the trial court's ruling has deprived [plaintiff] of the opportunity to plead a cause of action"] [citations omitted].)

[5] Quo warranto also applies in other contexts not at issue here. (E.g., *Nicolopulos v. City of Lawndale* (2001) 91 Cal.App.4th 1221 [challenges to an individual's right to hold office]; *American Distilling Co. v. Sausalito* (1950) 34 Cal.2d 660, 667[challenges to annexation proceedings].)

[6] In practice, "usually the action is filed and prosecuted by a private party who has obtained the consent of the Attorney General, for 'leave to sue in quo warranto.'" (*Nicolopulos, supra*, 91 Cal.App.4th at p. 1228.)

available procedure. (Code of Civil Procedure section 803; *International Assoc. of Firefighters, supra,* 174 Cal.App.3d at p. 694.)[7]

The leading case explaining these principles is *International Association of Fire Fighters.* There, the First District cogently explained their rationale: "public corporations . . . exercising governmental functions[] do so by reason of a delegation to them of a part of the sovereign power of the state. Where they . . . act . . . without having complied with the necessary prerequisites, they are usurping franchise rights as against paramount authority, to complain of which it lies only within the right of the state itself." (174 Cal.App.3d at p. 694, quoting *Van Wagener v. MacFarland* (1922) 58 Cal.App. 115, 120; accord *San Ysidro Irrigation Dist. v. Sup. Ct.* (1961) 56 Cal.2d 708, 715; see also *Citizens Utilities Co. of California v. Sup. Court* (1976) 56 Cal.App.3d 399, 406 ["the remedy of quo warranto belongs to the state, in its sovereign capacity,

---

[7] The full text of Code of Civil Procedure § 803 provides:

> An action may be brought by the attorney-general, in the name of the people of this state, upon his own information, or upon a complaint of a private party, against any person who usurps, intrudes into, or unlawfully holds or exercises any public office, civil or military, or any franchise, or against any corporation, either de jure or de facto, which usurps, intrudes into, or unlawfully holds or exercises any franchise, within this state. And the attorney-general must bring the action, whenever he has reason to believe that any such office or franchise has been usurped, intruded into, or unlawfully held or exercised by any person, or when he is directed to do so by the governor.

to protect the interests of the people as a whole and guard the public welfare"].)[8]

For that reason, a quo warranto action is the exclusive means to challenge "the regularity of *proceedings* by which municipal charter provisions have been adopted." (*International Association of Fire Fighters*, *supra*, 174 Cal.App.3d at p. 694 ["Since an action in the nature of quo warranto will lie to test the regularity of proceedings by which municipal charter provisions have been adopted, it follows that, once those provisions have become effective, their procedural regularity may be attacked only in quo warranto proceedings"] [italics added, collecting cases]; *Taylor v. Cole* (1927) 201 Cal. 327, 333 [quo warranto bars "judicial inquiry into . . . whether or not mandatory jurisdictional steps were followed in" enacting charter amendment].) That is true, regardless of the legal theory advanced. (*Id*. [declaratory and injunctive relief

---

[8] The court further explained that quo warranto has deep roots in the common law:

> The ancient writ of quo warranto was a high prerogative writ in the nature of a writ of right for the king, against one who usurped or claimed any office, franchise or liberty of the crown, to inquire by what authority he supported his claim, in order to determine the right. It ... commanded the respondent to show by what right, 'quo warranto,' he exercised the franchise, having never had any grant of it, or having forfeited it by neglect or abuse .... (*International Association of Fire Fighters* at p. 695, citation omitted.)

unavailable when quo warranto applies] [collecting cases]; *San Ysidro*, *supra,* 56 Cal.2d at p. 715 ["declaratory relief would not be available"].)

These core principles also apply to MMBA cases where a party alleges that a charter city amended its charter without first meeting and conferring regarding proposed amendments that would affect working conditions of city employees. (See *People ex rel. Seal Beach Police Officers Association, v. Seal Beach* (1984) 36 Cal.3d 591, 595-596; *City of Fresno v. People ex rel. Fresno Firefighters* (1999) 71 Cal.App.4th 82, 89 [quo warranto proper because plaintiffs "challeng[ed] the validity of the election" on the basis that the "City failed to meet and confer with the unions prior to submitting the proposed [ballot measure] to the voters].) This is known colloquially among public sector labor attorneys as "*Seal Beach* bargaining."

Our Supreme Court, however, acknowledges the difference between MMBA challenges to the *procedures* by which a charter amendment is enacted (to which quo warranto applies) and challenges to the *substantive content* of an amendment (to which it does not). (See *Seal Beach, supra,* 36 Cal.3d at 595-596. fn.2 & 3; *Santa Clara County Counsel Attorneys Assoc. v. Woodside* (1994) 7 Cal.4th 525, 534 [allowing MMBA claim based on charter section to proceed without quo warranto].)

Indeed, MMBA cases applying quo warranto to bar a party from pursuing a lawsuit involving the validity of charter amendments have ***all***

involved purely procedural challenges to those charter amendments—i.e., they challenged the procedures by which the amendments were enacted. For example, *International Association of Fire Fighters* (relied on by Respondent) affirmed dismissal because plaintiffs "sought a declaration that the resolution placing Proposition R on the ballot was invalid." (174 Cal.App.3d at p. 690.) And *Oakland Municipal Improvement League v. Oakland* (1972) 23 Cal.App.3d 165, 167 held similarly because plaintiffs "contend[ed] that the charter should be declared void because of defects in the process of enactment." By way of contrast, when MMBA claims challenge the substance of charter amendments, they may proceed without going through quo warranto. In fact, the City's principal case in the instant matter, *United Public Employees v. San Francisco* (1987) 190 Cal.App.3d 419, 421, itself was such a case. (See Exs. 5, 16.)

B. Quo Warranto Does Not Apply to Substantive Challenges to Charter Amendments

Quo warranto is only the "exclusive remedy as to matters coming *within its scope*." (*San Ysidro Irrigation Dist., supra,* 56 Cal.2d at p. 714 [italics added].) Thus, when a party does not seek to enforce procedural mandates entrusted to the Attorney General, quo warranto does not apply and is no bar to suit. Despite unwittingly broad language in the published cases (see fn.1, *supra*), no appellate court has applied quo

warranto to preclude a suit challenging the *substance* of a charter amendment. Indeed, such challenges are commonplace.[9]

That makes great practical sense. Lawsuits challenging the substantive validity of charter amendments do not implicate the same policy concerns animating the quo warranto procedure. For example, the Attorney General recently denied a request to sue in quo warranto on this basis where the union challenged the substantive content of charter amendments.

In Attorney General Opinion No. 12-203 (-- Ops.Cal.Atty.Gen. --, 2012 WL 6623712 (Dec. 14, 2012)), certain retirees sought leave to sue the City and County of San Francisco in quo warranto based on a voter-enacted charter amendment detrimentally affecting their vested pension rights. The retirees did *not* challenge the procedural regularity of the amendment. The Attorney General denied leave to sue in quo warranto because these "claims do not implicate the state's sovereign interest in the enforcement of state laws respecting the amendment of city charters." (*Id*.) It explained that "[i]n a proper case, a quo warranto action may be authorized to resolve allegations that a charter city unlawfully exercised its

[9] (E.g., *Edelstein v. City and County of San Francisco* (2002) 29 Cal.4th 164 [allowing substantive challenge to charter section without requiring quo warranto]; *Birkenfeld v. City of Berkeley* (1976) 17 Cal.3d 129, 135 [same re "the validity of an initiative amendment to the Charter of the City of Berkeley"].)

power to amend its charter," but that is because the retirees' substantive "contentions are not proper subjects of a quo warranto action" that remedy was improper. (*Id*. at *2, 4.)

The Attorney General reasoned that the state's "sovereign interest" that quo warranto sought to protect extended only to "whether a given charter amendment was *validly enacted* in compliance with state law":

> The state's sovereign interest . . . [is] uniquely implicated where a local agency has enacted or amended charter provisions in violation of state laws governing the lawmaking process. But—apart from the validity of a given charter amendment's enactment under the legislative processes specified and imposed by state law—it is neither necessary nor appropriate to use quo warranto procedures to litigate the question whether the substance of a particular charter amendment violates the rights of certain individuals or groups.

(*Id*. at *5 [italics original, footnote omitted].)

The Attorney General noted that the retirees could pursue their claims in state court because charter amendments "like any other law, may be challenged on [the] merits" and thus the retirees were not "foreclose[d] .

. . from pursuing an action to challenge the substantive validity of the complained-of charter amendment." (See *id*. at *5-6.)[10]

Respondent did not rely on Attorney General Opinion No. 12-203, even though attorney general opinions are entitled to "considerable weight" (*City of Long Beach v. Department of Industrial Relations* (2004) 34 Cal.4th 942, 952), and even though SJPOA brought it to the court's attention and the City acknowledged it had an meaningful opportunity to review it. (Pet. ¶¶ 18-20, 22.)

VI

RESPONDENT ERRED IN DISMISSING WITH PREJUDICE BECAUSE SJPOA'S SEVENTH CAUSE OF ACTION CHALLENGED THE SUBSTANTIVE LEGALITY OF MEASURE B

Respondent did not apply the principles outlined above, and instead relied on imprecise dicta to dismiss SJPOA's claim with prejudice:

> Defendant City of San Jose's motion for judgment on the pleadings as to [SJPOA's] seventh cause of action for violation of the [MMBA] is GRANTED WITHOUT LEAVE TO AMEND. "[A]n action in the nature of *quo warranto* constitutes the exclusive method for appellants to mount their attack on the charter amendments based upon the city's failure to comply with the [MMBA]." (*International Assn. of Fire Fighters v. City of Oakland* (1985) 174 Cal.App.3d 687, 698; see also 95 Ops.Cal.Atty.Gen.

[10] The Attorney General recognized the retirees brought a procedural irregularity claim based on San Francisco's failure to follow a local ordinance requiring the city to obtain an actuarial report, but the Attorney General still found quo warranto did not apply because its quo warranto authority did not extend to such procedures. (See *id*. at *6-7.)

> 31.) Plaintiff [SJPOA] argued that the seventh cause of action alleges a ***substantive*** violation of the [MMBA] and hence, *quo warranto* is not the exclusive method of attack. This court respectfully disagrees and finds the seventh cause of action alleges a ***procedural*** violation of the [MMBA], both ripe and unripe.

(See Ex. 19 [emphases original].) Respondent's authorities do not support dismissal, and indeed it relied on ambiguous language at odds with the central reasoning of *International Association of Fire Fighters*. Further, Respondent did not explain why SJPOA was conclusively barred from amending its claim. These fundamental errors leave SJPOA without a forum to prosecute its claim.

A. Respondent Misapplied Dicta in *International Association of Fire Fighters*

Although Respondent purported to apply *International Association of Fire Fighters*, it relied on overbroad dicta implying that *any* challenge to charter amendments based on the MMBA *must* be brought in quo warranto. (See *ibid*.) That case does not so hold. And in fact, *International Association of Fire Fighters* went to great lengths to carve out substantive challenges to charter amendments from the quo warranto procedure:

> [W]e emphasize that we are not here concerned with the *substantive contents* of the amendments. Rather, as was true in the court below, *only the propriety of the method by which appellants seek to challenge the procedural regularity of their enactment is legitimately before us*. We stress this since appellants

> devote a substantial portion of their argument to an effort to convince us otherwise. . . . *The conclusion we reach here, of course, in no way precludes an individual or group*, upon a proper showing of the confiscatory or discriminatory effect of the amendments, *from attacking the substantive merits thereof*.

(174 Cal.App.3d at pp. 692-693 [italics added, footnotes omitted.]) To make its point clear, the appellate court further noted that "the *sole* issue presented by the instant appeals is whether the trial court erred in dismissing the present actions on grounds that the *procedural regularity* of the enactment of the charter amendments could be challenged only by an action in the nature of quo warranto." (*Id*, italics added.) That accords with the animating principles behind quo warranto. (See Part IV.A, *supra.*) Respondent misapplied *International Association of Fire Fighters* because if it had correctly applied that case, it would have denied the City's motion for judgment on the pleadings or granted SJPOA leave to amend.

Similarly, Respondent misunderstood 95 Ops.Cal.Atty.Gen. 31 (June 11, 2012), its other cited authority. There the Attorney General found quo warranto was the only proper remedy exactly because the union challenged "the regularity of the proceedings" of a ballot measure. (*Id*. at *1.) Specifically, the union "argue[d] that the City violated the MMBA . . . by failing to meet and confer with respect to Measure D *before* the City Council voted to place Measure D on the ballot" (*id*. at *4, italics original)—i.e., a violation of *Seal Beach* bargaining. The union there did

not, however, challenge the substantive content of those amendments—as did SJPOA.

B. Respondent Confused the Bargaining Process Necessary to Put Measure B on the Ballot with that Necessary to Implement Measure B Once Enacted

By dismissing without leave to amend, Respondent implicitly found that SJPOA could plead no facts supporting an MMBA claim. (See *Virginia G. v. ABC Unified School Dist.* (1993) 15 Cal.App.4th 1848, 1852 ["denial of leave to amend constitutes an abuse of discretion if the pleading does not show on its face that it is incapable of amendment"].) It did not explain its reasoning for doing so, let alone explain what foreclosed SJPOA from alleging such facts. (See Ex. 19.) Respondent's ultimate conclusion, however, indicates it confused the bargaining process necessary to put Measure B on the ballot with that necessary to implement it once enacted.

SJPOA's complaint, however, did not allege any facts challenging Measure B's placement on the ballot, and instead only alleged facts detailing how the *already-enacted* measure itself violated the City's obligation to meet and confer under the parties' existing contract and future contracts. (See Ex. 1 ¶¶ 60, 92-102, 103-106; see also Ex. 14 at pp. 3-4.) SJPOA further alleged the City failed to bargain to impasse before implementing Measure B. (*Id*. ¶ 104.)

For that reason, the Attorney General understood that the quo warranto matter pending before it and that before Respondent were wholly

"separate and distinct." (See Ex. 22.) It thus acknowledged SJPOA's quo warranto challenge was to "procedural irregularities" surrounding Measure B's enactment, while its trial court pleadings challenged "involves the legal effect, *post-enactment* of a particular provision of Measure B." (*Id.*)

Indeed, rather than addressing why dismissal was proper under the facts SJPOA pled, the City led Respondent astray by artfully obscuring the distinction between the bargaining process necessary to put Measure B on the ballot (i.e., *Seal Beach* bargaining requiring quo warranto) with the bargaining process necessary to implement Measure B once enacted (not subject to quo warranto). Specifically, the City argued that the MMBA did not have any substantive requirements and thus that SJPOA's challenge was necessarily procedural and barred by quo warranto. (Pet. ¶¶ 12, 15, 19; Exs. 5, 16.) It further asserted that the only obligation the MMBA placed on the City was to meet and confer before placing Measure B on the ballot. (*Ibid*.) These arguments are incorrect.

First, our Supreme Court has held on numerous occasions that "the Legislature intended in the MMBA to impose substantive duties, and confer substantive, enforceable rights, on public employers and employees." (*Santa Clara County Counsel Attorneys Assoc. v. Woodside*

(1994) 7 Cal.4th 525, 539 [collecting cases].)[11] Those substantive duties are to engage in the meet-and-confer process before changing the terms and conditions of employment:

> The MMBA imposes on local public entities a duty to meet and confer in good faith with representatives of recognized employee organizations, in order to reach binding agreements governing wages, hours, and working conditions of the agencies' employees. (Gov.Code, § 3505.) 'The duty to bargain requires the public agency to refrain from making unilateral changes in employees' wages and working conditions until the employer and employee association have bargained to impasse....'

(*Coachella Valley Mosquito and Vector Control Dist. v. PERB* (2005) 35 Cal.4th 1072, 1083, quoting *Woodside, supra,* 7 Cal.4th at p. 537.) And those duties are enforceable in court. (*Woodside, supra,* 7 Cal.4th at p. 541 ["The case law in this state is indeed unanimous that a writ of mandate lies

[11] *Woodside* is still good law and controls here. Subsequent cases finding that case was overruled by statute due to PERB exclusivity do not apply. The Legislature expressly carved out police officers' MMBA claims from PERB jurisdiction, and thus unlike almost all other local employees, police officers can enforce the MMBA in court. (See Gov. Code § 3511; *Coachella Valley Mosquito and Vector Control Dist. v. PERB* (2005) 35 Cal.4th 1072, 1077 fn.1 ["Exempt from the PERB's jurisdiction under the MMBA are peace officers"].)

for an employee association to challenge a public employer's breach of its duty under the MMBA"] [collecting cases].)[12]

This post-enactment collective bargaining process is ***not*** the same as a procedural challenge to a charter amendment barred by quo warranto. SJPOA acknowledged that "the FAC somewhat inartfully distinguishe[d] between 'procedural and substantive' violations of the MMBA" but argued that dismissal was improper because the union's "core challenge is that Measure B constitutes unilateral action on mandatory subjects of bargaining" as the already-enacted measure was applied to its members. (Pet. ¶14; Ex. 14 at p. 10 fn.8.) It further explained that the FAC's use of the term "procedural" was "directed at Measure B's infringement on the MMBA's meet and confer *process*. But it is *not* 'procedural' in the manner urged by the City—i.e., the FAC does not challenge the manner in which Measure B was put on the ballot." It respectfully requested leave to amend to clarify any uncertainty. (*Ibid.*)

---

[12] To the extent SJPOA's MMBA claim must be pursued by Code of Civil Procedure section 1085 mandamus, SJPOA should be allowed to amend its pleading to do so. (*Woodside, supra,* 7 Cal.4th at 540 ["The MMBA . . . created a clear and present duty on the part of the County to meet and confer with the Association in good faith on the fixing of the Association members' salary and other conditions of employment, and created in Association members the corresponding beneficial right to meet and confer."]; *Virginia G., supra,* 15 Cal.App.4th at p. 1852.)

Second, the City is flatly incorrect that it had no duty to bargain after Measure B was enacted. *Woodside* expressly held that the MMBA's meet-and-confer duty applied to the implementation of a charter section affecting employee salaries. (7 Cal.4th at p. 534 [MMBA duty applies to the bargaining employees sought over "salaries [set] pursuant to County Charter section 709"]; *id*. at p. 540 ["[t]he MMBA, at Government Code section 3505, created a clear and present duty on the part of the County to meet and confer with the Association in good faith on the fixing of the Association members' salary and other conditions of employment"].)

The City cited no authority for its assertion that meet-and-confer obligations are completed once a charter amendment is on the ballot, even though it had the burden as the moving party. And contrary to the City's contention first raised at the hearing, this is not a "new" and unrecognized cause of action, as the cases cited above demonstrate. The law is clear that meet-and-confer is necessary every time a public employer implements changes affecting the terms and conditions of employment. (See Gov. Code § 3505; *Woodside, supra,* 7 Cal.4th at p. 542 ["there are no statutory

or common law grounds for limiting" duty to meet and confer]; *Coachella Valley Mosquito and Vector Control Dist., supra,* 35 Cal.4th at p. 1083.)[13]

C. SJPOA Should be Allowed to Proceed With the Seventh Cause of Action, or Granted Leave to Amend

Respondent should have denied the City's motion for judgment on the pleadings as to the Seventh Cause of Action in its entirety, or granted leave to amend. That is true for numerous reasons. First, Respondent fundamentally erred when it misapplied the law on quo warranto and when it confused the bargaining process necessary to put Measure B on the ballot with that necessary to implement it once enacted. The FAC made clear SJPOA's lawsuit only presented a substantive, post-enactment challenge to Measure B. (See Ex. 1.) Second, because a court cannot grant judgment on the pleadings as to part of a cause of action, it should have denied the motion even if Respondent rejected SJPOA's explanation for the FAC's inartful distinction between "procedural and substantive" challenges to the MMBA because its substantive challenge stated a viable claim. (*PH II, v. Sup. Ct.* (1995) 33 Cal.App.4th 1680, 1682 ["A demurrer does not lie to a portion of a cause of action"].)

---

[13] *Woodside* noted the broad quo warranto language in *International Association of Fire Fighters*, but it expressly refrained from "deciding whether the result of that case is correct." (See 7 Cal.4th at p. 541 fn.2.) SJPOA submits the *result* in *International Association of Fire Fighters* is indeed correct, but that the overbroad dicta in that case which *Woodside* refers to is not because quo warranto is limited to challenges to the enactment of charter amendments.

In any event, even if dismissal was proper (and it was not), under the circumstances here, Respondent should have granted leave to amend to cure any deficiencies in pleading. (*Virginia G., supra,* 15 Cal.App.4th at p. 1852.) This was the first round of pleading attacks (Pet. ¶¶ 6, 11-12), and SJPOA noted that any deficiencies were curable by amendment.

VII

RESPONDENT'S RULING LEAVES SJPOA WITHOUT A FORUM TO ENFORCE THE MMBA

Respondent may have mistakenly believed SJPOA could pursue its claims in quo warranto, but the effect of its ruling is that SJPOA is left without a forum. The ruling barred further litigation of the Seventh Cause of Action in its entirety, and SJPOA cannot proceed to trial with it. That is so even though the Attorney General—who is charged with granting leave to sue in quo warranto—confirmed that SJPOA's lawsuit and its quo warranto action are indeed "separate and distinct." (Ex. 22.) SJPOA thus may likely also be barred from bringing its present claim in its quo warranto action (see *id*.; -- Cal.Atty.Gen.Ops. --, 2012 WL 6623712), even though our Supreme Court has counseled that "no case suggests that violation of a right based in the MMBA is without *some* judicial remedy." (*Woodside, supra,* 7 Cal.4th at p. 541 fn.2.)

SJPOA is thus left with a right without a remedy, an untenable result given the grave consequences for San Jose's police officers, including unilateral 16% reductions to their contractual salaries and the inability to enforce the MMBA's bargaining obligation as Measure B is implemented to their detriment. This Court should grant the Petition to prevent that result. Further, the courts, litigants, and the Attorney General would all benefit from this Court's clarification that only challenges to the enactment of charter amendments—as opposed to substantive challenges thereto—are subject to quo warranto.

VIII

CONCLUSION

For all these reasons, this Court should grant the petition for writ of mandate and direct the trial court to issue a new order denying the City's motion for judgment on the pleadings on the Seventh Cause of Action and/or granting SJPOA leave to amend.

Dated: February 21, 2013

Respectfully submitted,

CARROLL, BURDICK & McDONOUGH LLP

By _____

Gregg McLean Adam
Gonzalo C. Martinez
Attorneys for Petitioner
SAN JOSE POLICE OFFICERS' ASSOCIATION

CERTIFICATE OF WORD COUNT

Pursuant to Rule 8.204(c) of the California Rules of Court, I certify that this brief contains 7,836 words, as determined by the computer program used to prepare the brief.

Dated: February 21, 2013

By _____
Gonzalo C. Martinez

EXHIBITS INDEX

#	Document	Date	Page
	Police Officers' Assn. v. City of San Jose and City of San Jose City Council Your *File* No.: LA2012106837 File No, 038781" to Marc J. Nolan, Deputy Attorney General, from Jonathan Yank of Carroll, Burdick & McDonough LLP		
13.	Amended Notice of Motion and Motion for Judgment on the Pleadings as to the San Jose Police Officers' Association's Seventh Cause of Action for Violation of The Meyers-Milias-Brown Act	12/26/2012	000165
14.	Plaintiff San Jose Police Officers' Association's Opposition to Defendant City of San Jose's Motion for Judgment on the Pleadings Regarding Violation of Meyers-Milias-Brown Act (Seventh Cause of Action)	01/15/2013	000170
15.	Plaintiff San Jose Police Officers' Association's Objections and/or Motion to Strike the Request for Judicial Notice in Support of the Motion for Judgment on the Pleadings for Violation of Seventh Cause of Action	01/15/2013	000185
16.	Reply Memorandum by City of San Jose in Support of its Motion for Judgment on the Pleadings as to the San Jose Police Officers' Association's Seventh Cause of Action for Violation of the Meyers-Milias-Brown Act	01/22/2013	000189
17.	Response by City of San Jose to San Jose Police Officers' Association's Objections to the City's Request for Judicial Notice	01/22/2013	000205
18.	Reporter's Transcript of Proceedings held January 29, 2013	01/29/2013	000211
19.	Order Re: Motions for Judgment on the Pleadings	02/01/2013	000234
20.	Letter regarding "Request for Opinion in *Quo Warranto* Application in *San Jose Police Officers' Association v. City of San Jose, et al.*, Your File No. LA2012106837" to Marc J. Nolan, Deputy Attorney General, from Gregg McLean Adam of Carroll, Burdick & McDonough LLP	02/05/2013	000238

Gregg McLean Adam, No. 203436
Jonathan Yank, No. 215495
Gonzalo C. Martinez, No. 231724
Jennifer S. Stoughton, No. 238309
Amber L. West, No. 245002
CARROLL, BURDICK & McDONOUGH LLP
Attorneys at Law
44 Montgomery Street, Suite 400
San Francisco, CA 94104
Telephone: 415.989.5900
Facsimile: 415.989.0932
Email: gadam@cbmlaw.com
jyank@cbmlaw.com
gmartinez@cbmlaw.com
jstoughton@cbmlaw.com
awest@cbmlaw.com

Attorneys for Plaintiff
San Jose Police Officers' Association

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SANTA CLARA

BY FAX

SAN JOSE POLICE OFFICERS' ASSOCIATION,

Plaintiff,

v.

CITY OF SAN JOSE, BOARD OF ADMINISTRATION FOR POLICE AND FIRE DEPARTMENT RETIREMENT PLAN OF CITY OF SAN JOSE, and DOES 1-10, inclusive,

Defendants.

No. 1-12-CV-225926

FIRST AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF FOR:

(1) VIOLATION OF CALIFORNIA CONSTITUTIONAL CONTRACTS CLAUSE;

(2) VIOLATION OF CALIFORNIA CONSTITUTIONAL TAKINGS CLAUSE;

(3) VIOLATION OF CALIFORNIA DUE PROCESS;

(4) VIOLATION OF CALIFORNIA FREEDOM OF SPEECH—RIGHT TO PETITION;

(5) VIOLATION OF SEPARATION OF POWERS DOCTRINE;

(6) BREACH OF CONTRACT;

(7) VIOLATION OF MMBA;

(8) VIOLATION OF CAL. PENSION PROTECTION ACT.

Plaintiff SAN JOSE POLICE OFFICERS' ASSOCIATION ("SJPOA" or "Plaintiff") on behalf of its members brings this action for declaratory, injunctive and other relief asking the Court to declare unconstitutional and temporarily and permanently enjoin implementation of proposed changes to the San Jose Police and Fire Department Retirement Plan:

1. Plaintiff challenges provisions of "The Sustainable Retirement Benefits and Compensation Act," which was passed by the San Jose electorate as Measure B at the June 5, 2012 election ("Measure B"), and which will amend provisions of the San Jose City Charter in ways detrimental to the SJPOA and its members. Unless restrained, Measure B will become effective immediately and directs the City Council with the goal that implementing ordinances "shall become effective no later than September 30, 2012."

2. Numerous provisions of Measure B violate the California Constitution on their face and as applied to Police Officers who were participants in the 1961 Police and Fire Department Retirement Plan ("Retirement Plan") on or prior to June 5, 2012, in that Measure B:

a. substantially impairs these employees' contracts with the City of San Jose for the Retirement Plan and benefits in place when they began working for the police department, and as improved during their employment;

b. constitutes a taking of private property rights without just compensation or due process;

c. violates their right to free speech and to petition the courts through a "poison pill" that punishes employees if they successfully challenge portions of Measure B;

d. violates the separation of powers doctrine by giving the City ultimate authority over whether an unlawful ordinance implementing Measure B should be amended or severed;

e. impairs SJPOA members' rights under their Memorandum of Understanding ("MOA") with the City by unilaterally increasing contributions for future retiree medical benefits above what is contractually agreed;

f. violates the Meyers-Milias-Brown Act ("MMBA"), Gov. Code section 3500, *et seq.,* by unilaterally reducing employee salaries—a mandatory subject of bargaining—if Section 1506-A of Measure B is declared invalid; and

g. violates the California Pension Protection Act by abrogating the fiduciary duties of the Board of Administration for Police and Fire Department Retirement Plan ("Retirement Board") to current and future retirees.

3. Hundreds of current Police Officers on whose behalf Plaintiff brings this action will suffer severe and irreparable harm upon implementation of Measure B and amendment of the Charter. Among other things, Measure B forces employees to make the Hobson's choice between standing on their existing pension rights and having their existing salaries reduced by as much as 16%, or "voluntarily" opting into a second tier Retirement Plan with lesser benefits so they can keep their current salaries. Measure B also has numerous other consequences for Police Officers as further described herein, including detrimentally changing the definition of disability retirement, authorizing suspension of cost-of-living adjustments, eliminating the Supplemental Retirement Benefits Reserve program, and dramatically increasing salary deductions for future retiree healthcare.

4. Measure B also discourages employees from exercising their freedom of speech rights, including their right to petition the courts for redress. For example, it specifically provides that if its lesser "voluntary" retirement program is "illegal, invalid or unenforceable as to Current Employees . . . then . . . an equivalent amount of savings shall be obtained through pay reductions." It also gives the City ultimate authority to decide whether any implementing ordinance determined to be unlawful should be "amend[ed] ... or ... sever[ed]," regardless of any court order obtained by employees enforcing their rights.

JURISDICTION AND VENUE

5. All parties exist and reside within the County of Santa Clara, and all relevant actions and omissions took place within the County of Santa Clara, making this Court the appropriate venue for this action.

THE PARTIES

6. Plaintiff SJPOA is a California nonprofit unincorporated labor association representing over a thousand individuals working in Police Officer classifications in Bargaining Units 11, 12, 13 and 14 (collectively "Police Officers") employed by the City of San Jose. SJPOA's purposes include advocating for the interests of its members with respect to their collective bargaining rights, including their pension and retirement rights. SJPOA brings this action on behalf of itself and its members, having standing to do so under the doctrine articulated by the California Supreme Court in *Professional Fire Fighters v. City of Los Angeles* (1963) 60 Cal.2d 276, and *Int'l Assoc. of Fire Fighters v. City of Palo Alto* (1963) 60 Cal.2d 295.

7. The members of SJPOA are current employees of the City of San Jose who were induced to accept positions in and continued to work in the police department in reasonable reliance that they had the "collateral right to earn future pension benefits through continued service, on terms substantially equivalent to those" existing at the time they began working for the city, or enhanced during their service with the City. (*Legislature v. Eu* (1991) 54 Cal.3d 492; *Carman v. Alvord* (1982) 31 Cal.3d 318.)

8. Despite serving in the capital of Silicon Valley, San Jose Police Officers are amongst the lowest paid Police Officers in the Bay Area. They previously agreed to a 10% reduction in total compensation, effective since July 1, 2011 and continuing at least until June 30, 2012. They currently pay approximately 10.46% of their salary towards normal cost retirement contributions. They also currently pay an additional 7.01% of their salary towards retiree medical benefits—a contribution rate that far exceeds the industry standard. Under Measure B, Police Officers' payments

would substantially increase through additional salary deductions, further decreasing their net income.

9. The City of San Jose ("City") is a charter city that employs the members of SJPOA and has established the Retirement Plan. The City is governed by the San Jose City Charter ("Charter") and by superseding state law. Labor-management relations between the SJPOA and the City are governed by the MMBA.

10. The Retirement Plan is administered by Defendant Board of Administration of the Police and Fire Department Retirement Plan ("the Board"), whose primary fiduciary duties are to current and future members and their beneficiaries. The Board has no authority over any changes to the design and terms of the Retirement Plan. Its duty is to administer the Plan according to its terms. Pursuant to Code of Civil Procedure section 389(a)(1), the Board is named herein solely as a necessary and indispensable party because of its role in administering the benefits at issue in this action; otherwise, complete relief cannot be accorded. *See* Cal. Civ. Proc. Code § 389(a)(1). No damages, writ, injunctive or other relief, including attorneys' fees or costs, is presently sought against the Board in this action.

11. The terms and conditions of SJPOA members' employment, including their right to certain retirement benefits and their current salaries, are governed by a MOA between the SJPOA and the City, which was entered into pursuant to the Meyers-Milias-Brown Act, Government Code section 3500, et seq.

BACKGROUND

12. The San Jose City Charter establishes that the City has a duty to establish and maintain a retirement plan for its employees. As further described herein, the Charter mandates certain minimum retirement benefits for Police Officers.

13. The Retirement Plan applicable to Police Officers is contained in the San Jose Municipal Code. The Charter imposes on the City a duty to keep the Retirement Plan actuarially sound.

14. The Retirement Plan is funded by contributions from employees and the City as specified in the funding provisions of the City Charter, Municipal Code, and MOA.

15. In the spring and early summer of 2011, SJPOA and the City had lengthy negotiations over retirement benefits during collective bargaining negotiations. Specifically, the City represented that, according to its projections, retirement costs were rapidly escalating and needed to be reduced.

16. The SJPOA and the City agreed to continue negotiations on pension and retiree health care benefits for current and future employees, even though they had reached agreement on the other terms and conditions of employment.

17. The City subsequently began a campaign to reduce all City employees' pension benefits, including those of Police Officers, through a City-sponsored voter ballot initiative and a threatened declaration of fiscal emergency. If implemented, Measure B will amend the San Jose City Charter.

18. To support the City's efforts to declare a fiscal emergency and the ballot measure, the City's mayor asserted repeatedly in public statements and press releases that, by Fiscal Year ("FY") 2015-16, the City's retirement contribution costs would reach $650 million per year.

19. On July 5, 2011, certain City Council members formally proposed a ballot initiative that would unilaterally reduce retirement benefits of all City employees, including those represented by SJPOA. The ballot measure was purportedly directed at reducing the City's retirement costs to FY 2010-2011 levels by FY 2015-16.

20. The City's projected retirement contribution increases were partly rooted in the City's reduced contributions during times when the Retirement Plan had an actuarial surplus.[1] For example, in fiscal years 1993 through 2004 the City reduced

[1] An actuarial surplus is defined as a situation where the actuarial value of the assets in the retirement fund is more than the value of the plan's actuarial liability.

its contributions into the Retirement Plan by approximately $80 million. The Retirement Board later concluded in 2011 that, had the City not reduced its contributions during that time period, the $80 million would have grown to $120 million. That increased the Retirement Plan's Unfunded Actuarial Liability by approximately 44%.

21. On December 1, 2011, the independent actuary for the Retirement Plan issued a report with updated projections for the City's prospective retirement costs which showed that the City's retirement contributions would be far less than previously estimated and far less than the City had been relying on as justification for the proposed declaration of fiscal emergency and ballot measure. Specifically, the report showed that the City's contributions for Fiscal Year 2012-13 for the Police and Fire Retirement Plan would be approximately $55 million less than previously expected.

22. At a City Council meeting on December 6, 2011, the Mayor withdrew his proposal to have the City Council declare a fiscal emergency. Even though there was no fiscal emergency, the City Council nonetheless proceeded with placing the ballot measure before the voters.

23. On February 21, 2012, the City issued a revised ballot measure. On March 6, 2012, the City Council voted to place that revised ballot measure ("Measure B") on the June 5, 2012 election ballot. On April 10, 2012, the Sixth Appellate District Court of Appeal found the ballot statement of issue was "impermissibly partisan," and ordered the City to revise it, which it did.

24. Measure B was passed by the San Jose electorate on June 5, 2012. If allowed to go into effect, Measure B will change SJPOA members' retirement benefits and the Retirement Plan as further described below.

POLICE OFFICERS' RIGHTS UNDER THE RETIREMENT PLAN AND MOA

25. The Retirement Plan established by the pre-Measure B City Charter and the San Jose Municipal Code gives Police Officers constitutionally-protected and vested contractual and property rights to certain pension benefits and the right to

proceed under the Retirement Plan in place when they began working for the City, as well as any improvements to those benefits made during their employment with the City.

26. SJPOA members' benefits and rights became vested when they accepted their positions with the City or, with respect to any improvements to those benefits, when they continued laboring for the City. In exchange for these benefits and rights, SJPOA members accepted their positions with the City and will continue to as they have in the past dutifully labor for the City of San Jose.

27. The City Charter prescribes certain minimum benefits for Police Officers. The Charter expressly states that the City "may grant greater or additional benefits." There is no provision for reducing employee benefits or for reducing benefits below the minimum in the Charter. As further described herein, Police Officers' pension rights arise from the Charter, the Municipal Code, and the MOA.

28. **Service Retirement and Pension Calculation.** The Charter (Section 1504) establishes Police Officers' right to service retirement. The Municipal Code provides that Police Officers are eligible to begin receiving service retirement benefits at age 50 with 25 years of service, at age 55 with 20 years of service, or at any age following 30 years of service. Upon retirement, they are entitled to a pension calculated according to the following formula contained in Municipal Code section 3.36.809: 2.5% of final compensation for each year of service up to 20 years, plus 4% of final compensation for each year of service between 21-30 years up to a cap of 90% of final compensation.

29. **Disability Retirement and Pension Calculation.** The Charter (Section 1504) establishes Police Officers' right to disability retirement and defines "disabled" as "the incurrence of a disability . . . which renders the officer or employee incapable of continuing to satisfactorily assume the responsibilities and perform the duties and functions of his or her office or position and of any other office or position *in the same classification of offices or positions* to which the City may offer to transfer

him or her ...." (emphasis added). Upon disability retirement, Police Officers are entitled to a pension calculated according to the following formula in Municipal Code section 3.36.1020: 50% of final compensation, plus 4% of final compensation for each full year of service exceeding 20 years, to a cap of 90% of final compensation.

30. **Splitting of Normal Retirement Costs According to 3:8 Ratio.** The Charter (Section 1504) and Municipal Code (Section 3.36.410) establish that Police Officers contribute 3/11ths of the normal costs of maintaining the Retirement Plan, and the City pays 8/11ths.

31. **City Pays All Unfunded Actuarial Liability ("UAL") for Pensions.** The Municipal Code (Sections 3.36.1520 and 3.36.1550) establishes that the City pays any UAL generated by the Retirement Plan.[2] Under the Retirement Plan, the City is required to pay UAL and Police Officers did not pay UAL for pensions.

32. When the Retirement Plan generated an actuarial surplus, the City reaped all of the benefits and used those excess earnings to reduce its contribution rates during FYs 1993-2004 by approximately $80 million. According to the Retirement Board, that $80 million would have grown to $120 million and increased the existing UAL by 44%.

33. **Yearly Cost of Living Adjustments ("COLA").** The Municipal Code (Section 3.44.150) establishes Police Officers' right to an annual 3% COLA to pension benefits upon retirement. The normal cost of the COLA is funded by contributions from Police Officers and the City on a 3-8 basis (Section 3.44.090) to fund the normal cost.

34. **Supplemental Retiree Benefit Reserve ("SRBR") Payments.** The Municipal Code (section 3.36.580) also establishes a supplemental retirement benefit reserve, funded from employee and City contributions and administered solely for the

---

[2] UAL is "the difference between actuarial accrued liability and the valuation assets in a fund. [Citation] Most retirement systems have [UAL]. . . . [UAL] does not represent a debt that is payable [in full] today." (*County of Orange v. Association of Orange County Deputy Sheriffs* (2011) 192 Cal.App.4th 21, 34.)

benefit of Retirement Plan members, from which the Retirement Board has the discretion to make a variable annual payment to retirees based on investment performance.

35. **Contribution Rates for Retiree Healthcare.** Employee contribution rates for retiree healthcare are established through the collective bargaining process. Thus, the MOA sets Police Officers' contribution rates for retiree healthcare. Specifically, contributions for retiree medical benefits are made by the City and Police Officers on a 1:1 ratio. The MOA caps any increase in these contribution rates for Police Officers at 1.25% per year. The MOA further provides that employees shall not pay more than 10% of their pensionable salary to fund retiree healthcare. Currently, SJPOA members pay 7.01% of their pensionable pay toward retiree healthcare costs, which will increase to 8.26% on July 1, 2012 under the MOA.

36. In enacting the Charter and Municipal Code sections described above, and by ratifying the MOA, the City expressly and/or implicitly intended to bind itself to these terms for current Police Officers. These rights became protected vested rights when these officers began working with the City (or continued to work following benefit improvements), and cannot be legislated away by the City or by ballot initiative. Nothing in the Charter and the Municipal Code prohibits the creation of any implied rights.

MEASURE B: "THE SUSTAINABLE RETIRMENT BENEFITS AND COMPENSATION ACT"

37. Measure B makes a number of significant and detrimental changes to the Retirement Plan and to retiree benefits established in the MOA affecting Police Officers. All of these changes were made without any consideration and without giving Police Officers comparable new advantages.

38. By its own terms, Measure B will immediately amend the San Jose City Charter and "prevail[s] over all other conflicting or inconsistent wage, pension or post employment benefit provision in the Charter, ordinances, resolutions or other

enactments." Some of these changes take place immediately, while others will require implementing ordinances, though Measure B would appear to require that the City begin promulgating such implementing ordinances right away. Measure B provides that it is the goal that any implementing ordinances "shall become effective no later than September 20, 2012."

39. Measure B does not purport to retroactively change the pension formulas for prior service years and only purports to apply prospectively.

Sections 1506-A and 1507-A: A "Voluntary" Choice Between Giving Up the Right to Current Level of Salary Now or Giving Up Future Retirement Benefits

40. The core of Measure B is the misleadingly-titled "Voluntary Election Program" ("VEP") which creates "an alternative retirement program" that would provide benefit levels that are *less* favorable than those outlined above. Employees who "opt in" to the VEP will maintain their current salaries and the current 3:8 cost-sharing ratio for the normal costs. By contrast, Police Officers who elect to remain in the current Retirement Plan for future service credits will be forced to pay up to 50% of the pension UAL through a reduction in their current salaries up to 16%. This Hobson's choice is contained in Sections 1506-A and 1507-A of Measure B.

41. Section 1506-A mandates that employees not entering the VEP will have their salary reduced by as much as 16% in order to pay for up to half of the pension UAL. Although Measure B styles this reduction as an "adjust[ment] through additional retirement contributions," Measure B would effectively require Police Officers (who have never paid UAL contributions for their pensions) to offset the City's UAL costs through salary deductions resulting in reductions to take-home pay without giving them any comparable advantage.

42. Section 1507-A sets out the VEP which caps employees' pension benefits and prospectively changes the pension formula for those employees "voluntarily" "opting" into this system. Section 1507-A mandates that such employees "will be required to sign an irrevocable election waiver (as well as their

spouse or domestic partner, former spouse or former domestic partner, if legally required) acknowledging that the employee irrevocably relinquishes his or her existing level of retirement benefits and has voluntarily chosen reduced benefits."

43. The VEP imposes a reduced retirement benefits formula as follows: 2% of final compensation for each year of prospective service, up to a cap of 90% of final compensation. It re-defines "final compensation" as "the average annual pensionable pay of the highest three consecutive years of service." Section 1507-A also increases the retirement age to 57 for Police Officers, including the eligibility to retire after 30 years of service, and disallows retirement before age 50. It caps COLA increases at 1.5% per fiscal year. Finally, it imposes a new requirement that an employee is eligible for a full year of service credit only upon reaching 2080 hours of regular time worked, excluding overtime.

44. In exchange for giving up their rights, Police Officers entering the VEP keep their current salaries, do not pay UAL and retain the 3:8 cost-sharing ratio—rights which Police Officers already have. Police officers forced into VEP would thus receive no comparable advantage for the waiver of their rights.

45. The VEP presents a Hobson's choice that is unconscionable and unlawful because current employees have no meaningful choice. The City is obligated by the MOA to maintain contractual salaries and retiree healthcare contributions at the agreed rate, and is also obligated by the Charter and Retirement Plan to pay Police Officers the benefits under the retirement system in place when they began working for the City, as well as any enhancements made during their service with the City. The City may not lawfully renege on either of its obligations, let alone penalize current employees for standing on their rights.

46. An employee's election under the VEP is not "voluntary" at all and fails for lack of consideration in the form of a comparable advantage because, regardless of what decision an employee makes, he or she is forced to give up valuable rights protected under the law. Further, any such choice is made under economic

duress because employees not electing the VEP have their salaries reduced by as much as 16%.

47. Although the VEP would require IRS approval, Measure B mandates that the "compensation adjustments" shall be effective regardless of whether IRS approval has been given and regardless of whether the City Council has implemented the VEP.

48. The City has known since at least January of 2012 that the VEP will not receive IRS approval in 2012 and is likely never to receive such approval. Nonetheless, the City Council voted to put Measure B, including the VEP, on the June 5, 2012 ballot.

Section 1509-A: Evisceration of Disability Retirement Availability

49. Section 1509-A of Measure B immediately and radically alters Police Officers' rights to disability retirement by unilaterally imposing numerous burdensome requirements, including that "City employees must be incapable of engaging in *any* gainful employment for the City." (Emphasis added.) Specifically, Measure B re-defines disability retirement for Police Officers by now requiring a determination that an employee be unable to "perform *any other jobs* described in the City's classification plan *in the employee's department* because of his or her medical condition." (Emphasis added.) The practical effect for a Police Officer is that if he or she is able to perform *any* function within the police department—including non-peace officer functions—he or she is now ineligible for disability retirement. Under the current Retirement Plan, such an employee would have been eligible for disability retirement if he or she could not perform work within his or her own classification.

50. Measure B further requires that a disability retirement assessment be made even if there are *no* positions for which an otherwise-disabled Police Officer may be eligible—i.e., even if there are no vacancies for such jobs. That means that if an otherwise-disabled employee is found to be able to perform non-peace officer functions in his or her department but there is no available vacancy, that employee will

be ineligible for disability retirement. Even if there is an available vacancy, Measure B would not require that the officer be placed in the vacancy. Under Measure B such an employee would get ***nothing*** even though he or she was incapacitated in the line of duty. Measure B does not provide employees with any comparable advantage for taking away this right.

Section 1510-A: Unfettered Right to Deny COLA Increases

51. Section 1510-A gives the City the right to deny COLA increases to non-VEP and VEP employees alike. Upon a unilateral declaration of "fiscal and service level emergency" by the City Council, it allows the City to suspend COLA increases to applicable retirees (defined as "current and future retirees employed as of the effective date of this Act") for up to five years. Measure B does not require that the time period for which COLAs are suspended have any nexus to the declared emergency. Nor does Measure B contain any definition of a "fiscal and service level emergency" or even require that the City Council's suspension of COLAs be "reasonable" under the circumstances or reasonably related to the declared emergency. Measure B does not provide employees with any comparable advantage for taking away this right.

52. Any "suspend[ed]" COLA increases are automatically ***forfeited*** because Measure B directs that COLAs "shall" only be restored "prospectively" and even then only "in whole or in part." Measure B provides no way for retirees to obtain past COLAs to which they were entitled, nor does it provide a comparable advantage for the loss of this protected right.

53. Additionally, Section 1510-A caps COLA increases once they are "restore[d]" as follows: 3% for current retirees and non-VEP employees, and 1.5% for VEP employees. There is also no requirement that any "restore[d]" COLAs be "reasonable" under the circumstances or reasonably related to the declared emergency, let alone any provision for affected employees to obtain past COLAs to which they were entitled.

Section 1511-A: Elimination of SRBR

54. Section 1511-A eliminates the SRBR in whole and with it any supplemental benefits that Police Officers would have received during retirement, even though such employees have paid into the SRBR. It directs that any funds in the SRBR be placed in the Retirement Plan and mandates that any supplemental benefits other than those authorized by Measure B "shall not be funded from plan assets." Measure B does not provide employees with any comparable advantage for taking away this right.

55. Elimination of the SRBR will have detrimental effects upon retirement of Police Officers who paid into the SRBR in expectation they would receive that benefit.

Section 1512-A: Increases to Payment for Retiree Healthcare

56. Section 1512-A dramatically increases the amount that Police Officers will have to pay for retiree healthcare. Under Measure B, Police Officers would be required to pay a full 50% of the normal cost and unfunded liability for the retiree healthcare plan. This would have the effect of eliminating the 10% cap contained in the MOA and, consequently, resulting in a significant net salary decrease, as the combined cost is currently 32% of salary. That salary decrease is in addition to and cumulative with the other salary deductions under Measure B, which will have a detrimental impact on SJPOA members.

57. Additionally, Measure B detrimentally re-defines "low cost plan" to mean "the medical plan which has the lowest monthly premium available to any active employee in either the Police and Fire Department Retirement Plan or Federated City Employees' Retirement Plan." That effectively makes it impossible for the SJPOA to bargain over retiree medical benefits, as it will fix employees' benefits to the lowest cost plan City-wide, regardless of whether such plan was bargained for by another bargaining unit or unilaterally imposed on another bargaining unit by the City.

Section 1513-A: Compromising Board's Fiduciary Duties to Current and Future Beneficiaries

58. Section 1513-A compromises the Retirement Board's constitutionally-based fiduciary duties to current and future beneficiaries, including SJPOA members, by forcing the Retirement Board to take into account "*any* risk to the City and its residents" in its actuarial analyses, by compelling the Retirement Board to equally "ensure fair and equitable treatment for current and future plan members *and taxpayers* with respect to the costs of the plans [,]" and requiring the Retirement Board to act with the objective "to minimize … the volatility of contributions required to be made by the City …." These changes violate Article XVI, section 17 of the California State Constitution, which mandates that the Retirement Board's fiduciary duties are owed only to participants and their beneficiaries.

Sections 1514-A and 1515-A: Poison Pill and Usurping Judicial Function

59. Measure B would punish employees for exercising their constitutional rights to challenge its provisions in the courts in at least two different ways. It also usurps the power of the judiciary.

60. Section 1514-A contains a wholly punitive "poison pill" that mandates that if Section 1506-A(b)—which requires that the salaries of non-VEP, current employees be reduced by as much as 16% to cover half of the UAL under the Retirement Plan—is "illegal, invalid or unenforceable as to Current Employees," then "an equivalent amount of savings *shall* be obtained through *pay reductions*." Measure B does not require that such pay reductions be used to pay UAL. It does not even provide any guidance as to what those reductions should be used for and appear to be reductions for the sake of reductions.

61. The absence of any such guidance makes plain that the reduction in employee salaries is merely punitive, *i.e.*, to discourage employees from challenging Measure B in court and to punish them if they are successful.

62. Section 1515-A contains another provision that provides that "[i]f any ordinance adopted pursuant to the Act is held to be invalid, unconstitutional or otherwise unenforceable by a final judgment, the matter shall be referred to the City Council" to have it decide "whether to amend the ordinance consistent with the judgment, or whether to determine the section severable and ineffective."

63. The City Council is not a court and may not decide the legality of a measure it unilaterally put before the voters. Under our system of government, the decisions described above are not up to the City Council but are the province of the courts. Measure B usurps the power of the judiciary to fashion an appropriate remedy and to decide the severability of unlawful ordinances promulgated thereunder.

64. Section 1515-A has the additional effect of discouraging employees from challenging Measure B in court, because even if they were successful, the City could take the position that it has the sole and ultimate authority to decide their suit.

RIGHT TO INJUNCTIVE AND DECLARATORY RELIEF

65. No adequate remedy exists at law for the injuries suffered by SJPOA members because the constitutional violations cannot be protected against and SJPOA members' rights cannot be preserved absent injunctive relief. If this Court does not grant injunctive relief of the type and for the purpose specified below, SJPOA and its members will suffer further irreparable injury.

66. Conversely, the City will suffer no cognizable harm by continuing to give effect to the Retirement Plan currently in place.

67. As a result, SJPOA requests that this Court preserve the *status quo ante* by preliminarily and permanently enjoining the City from enforcing or otherwise applying Measure B to its members.

68. An actual controversy has arisen and now exists between SJPOA and the City concerning their respective rights, duties, and obligations under the Retirement Plan. Plaintiff contends that by the foregoing acts and omissions, the City has violated SJPOA members' rights under the California Constitution, the City

Charter, the Retirement Plan and the MOA, as well as the MMBA and California Pension Protection Act.

69. SJPOA is informed and believes the City disputes the allegations regarding its obligations under and violation of the law and the contractual agreements.

70. At all times mentioned herein, the City has been able to perform its obligations under the law. Notwithstanding such ability, it failed and refused, and continues to fail and refuse, to perform its duties under the law and the agreements.

71. SJPOA requests a judicial determination of its rights and a declaration of the City's obligations under the California Constitution, the San Jose City Charter, Retirement Plan and the MOA, as well as under the MMBA and California Pension Protection Act. SJPOA further requests that this Court declare that Measure B is unlawful and unenforceable as applied to SJPOA members currently employed by the City, and that by purporting to apply Measure B to said employees the City violated its obligations under the law.

FIRST CAUSE OF ACTION
Impairment of Contract
Cal. Const. art. I § 9 and Cal. Civ. Code § 52.1

72. Plaintiff hereby incorporates by reference the preceding paragraphs.

73. Article I, Section 9 of the California Constitution prohibits laws that impair contracts. The City, in violation of Civil Code section 52.1[3], has violated and continues to violate the rights of Plaintiff's members herein alleged.

74. The Retirement Plan, as embodied in the San Jose Charter and Municipal Code, gives rise to vested contractual rights for employees in the Plan on or before June 5, 2012. Additionally, the MOA's sections on retirement benefits also give additional contractual rights to SJPOA members.

75. Measure B substantially impairs the contractual rights of Plaintiff's members.

---

[3] Civil Code section 52.1 creates a private right of action to seek redress in the Superior Court for violation of constitutional rights.

76. The substantial impairment is neither reasonable nor necessary to serve an important public purpose. Nor is it consistent with the theory and purpose or tied to the successful operation of the Retirement System.

77. Measure B, as applied to current employees, is unconstitutional and violates Article I, Section 9 of the California Constitution.

SECOND CAUSE OF ACTION
Taking
Cal. Const. art. I § 19 and Cal. Civ. Code § 52.1

78. Plaintiff hereby incorporates by reference the preceding paragraphs.

79. Article I, Section 19 of the California Constitution prohibits the taking of private property for public use in the absence of just compensation. The City, in violation of Civil Code section 52.1, has violated and continues to violate the rights of Plaintiff's members herein alleged.

80. SJPOA members have a vested property right in the benefits provided by the Retirement Plan, and in the Retirement Plan itself, in place when they began working for the City, as well as any enhancements made during their service with the City.

81. In addition, the retirement benefits are a form of promised deferred compensation. Measure B thus interferes with the investment-backed expectations of SJPOA members.

82. By taking these protected benefits without giving SJPOA members any comparable advantage, commensurate benefit or compensation, Measure B violates the California Constitution as a taking of property for a public purpose without just compensation.

83. Measure B will have a devastating economic impact on individual SJPOA members both now and in the future.

84. The substantial impairment worked by Measure B is neither reasonable nor necessary to serve an important purpose.

THIRD CAUSE OF ACTION
Due Process
Cal. Const. art. I § 7 and Cal. Civ. Code § 52.1

85. Plaintiff hereby incorporates by reference the preceding paragraphs.

86. Article I, Section 7 of the California Constitution prohibits the taking of property without due process. The City, in violation of Civil Code section 52.1, has violated and continues to violate the rights of Plaintiff's members herein alleged.

87. SJPOA members have a vested property right in the benefits provided by the Retirement Plan, and in the Retirement Plan itself, in place when they began working for the City, as well as any enhancements made during their service with the City.

88. By taking these protected benefits without giving SJPOA members any comparable advantage, commensurate benefit or compensation, Measure B violates the California Constitution as a taking of property for a public purpose without due process of law.

FOURTH CAUSE OF ACTION
Freedom of Speech—Right to Petition
Cal. Const. art. I §§ 2 and 3, and Cal. Civ. Code § 52.1

89. Plaintiff hereby incorporates by reference the preceding paragraphs.

90. Article I, Sections 2 and 3 of the California Constitution guarantee the rights to freedom of speech and to petition the courts for redress. The City, in violation of Civil Code section 52.1, has violated and continues to violate the rights of Plaintiff's members herein alleged.

91. Section 1514-A of Measure B violates these protections by chilling or otherwise discouraging SJPOA members from exercising their right to seek redress in the courts by penalizing them for bringing a meritorious and successful lawsuit. Measure B provides that if Section 1506-A(b) "is determined to be illegal, invalid or unenforceable as to Current Employees[,]" current employees' salaries "shall" be reduced by "an equivalent amount of savings."

92. This "poison pill" unlawfully penalizes SJPOA members if they succeed in a lawsuit challenging Measure B. Among other things, there is no nexus between the extracted "savings" to the City by reduced employee salaries and Section 1506-A(b); that is, there is no requirement the "savings" be used to pay UAL. Instead, these deductions are wholly punitive in nature to discourage employees' exercise of their fundamental right to petition the courts.

93. Section 1515-A of Measure B also violates the right to petition by chilling or otherwise discouraging SJPOA members from exercising their right to seek redress in the courts because it gives the City Council ultimate authority to decide "whether to amend the ordinance consistent with the judgment, or whether to determine the section severable and ineffective." Measure B discourages employees from exercising their fundamental rights to petition the courts because, regardless of any successful court judgment, the City Council usurps the judiciary's role to decide the remedy, i.e., amendment or severability.

FIFTH CAUSE OF ACTION
Separation of Powers Doctrine
Cal. Const. art. III § 3 and Cal. Civ. Code § 52.1

94. Plaintiff hereby incorporates by reference the preceding paragraphs.

95. Article III, Section 3 of the California Constitution provides for the separation of powers between the legislative, executive, and judicial branches. The City, in violation of Civil Code section 52.1, has violated and continues to violate the rights of Plaintiff's members herein alleged.

96. Section 1515-A of Measure B violates the separation of powers doctrine because it gives the City Council ultimate authority to decide "whether to amend the ordinance consistent with the judgment, or whether to determine the section severable and ineffective" if such ordinance is found to be "invalid, unconstitutional or otherwise unenforceable." The City Council is not a court and may not decide the legality of a measure it unilaterally put before the voters. Measure B thus usurps the

authority of the judicial branch because it allows the City Council to decide the remedy if an ordinance is struck down, *i.e.*, amendment or severability.

SIXTH CAUSE OF ACTION
Breach of Contract

97. Plaintiff hereby incorporates by reference the preceding paragraphs.

98. The MOA is a valid and binding contract.

99. SJPOA members have at all times performed their duties under the MOA by, among other things, serving the City of San Jose in Police Officer classifications.

100. The City has breached the MOA by the actions and omissions alleged above. Specifically, Measure B, which the City Council drafted and voted to place on the June 2012 ballot as a voter initiative, denies or otherwise reduces gross and net salaries, increases employee deductions, contributions, and withholdings, and decreases retirement benefits agreed to in the MOA.

101. Additionally, the poison pill further breaches the MOA by unilaterally reducing the salaries of Police Officers by as much as 16%.

102. SJPOA members will suffer damages, as described above, caused by the City's breach of the MOA, in the form of reduced salaries and retirement benefits.

SEVENTH CAUSE OF ACTION
Violation of MMBA
Gov. Code § 3512 *et seq.*

103. Plaintiff hereby incorporates by reference the preceding paragraphs.

104. The MMBA prohibits the City from taking unilateral action on matters impacting wages, hours, and other terms and conditions of employment for Police Officers without first providing the SJPOA with reasonable notice and an opportunity to bargain, resolve any differences, and reach agreement prior to implementation. Gov. Code § 3504.5. "The duty to bargain requires the public agency to refrain from making unilateral changes in employees' wages and working conditions until the employer and employee association have bargained to impasse." *Santa Clara County*

Counsel Attorneys Assoc. v. Woodside (1994) 7 Cal.4th 525, 537. The SJPOA and the City have not bargained to impasse.

105. Section 1506-A of Measure B violates the MMBA both substantively and procedurally because it directs that the City shall unilaterally reduce salaries by as much as 16% if the VEP is "illegal, invalid or unenforceable as to Current Employees," without requiring the City to bargain over such reductions and/or even if bargaining were to take place it makes the amount of salary reductions non-negotiable.

106. Section 1512-A violates the MMBA both substantively and procedurally because it unilaterally effects an increase in employee contributions for retiree healthcare benefits and, consequently, reduces net salaries. It also violates the MMBA because it effectively eliminates the SJPOA's ability to bargain with the City over retiree healthcare benefits, when such benefits are a mandatory subject of bargaining under the MMBA.

EIGHTH CAUSE OF ACTION
California Pension Protection Act
Cal. Const. art. XVI, § 17 and Cal. Civ. Code § 52.1

107. Plaintiff hereby incorporates by reference the preceding paragraphs.

108. Article XVI, section 17 of the California Constitution provides that a public employee retirement board's fiduciary duties are to current and future retirees and their beneficiaries. It further provides that the retirement board "shall have plenary authority and fiduciary responsibility for investment of moneys and administration of the system . . . ." The City, in violation of Cal. Civ. Code section 52.1, has violated and continues to violate the rights of plaintiff's members herein alleged.

109. Measure B violates the California Constitution because it compromises the Retirement Board's constitutionally-based fiduciary duties to SJPOA members, who participate in the plan as future retirees, by compelling the Board to consider "*any* risk to the City and its residents" in its actuarial analyses and by compelling the

Retirement Board to equally "ensure fair and equitable treatment for current and future plan members *and taxpayers* with respect to the costs of the plans . . . ."

PRAYER

WHEREFORE, Plaintiff SJPOA prays for the following relief:

1. A declaration that:

a. Measure B cannot be applied to SJPOA members working for the City on or before June 5, 2012;

b. the City was and is required to provide SJPOA members with the retirement benefits and Retirement Plan in place when they began working for the City, as well as any enhancements made during their service with the City;

c. the City is required to provide the retirement benefits delineated in the MOA;

d. and, by the above-described actions and omissions, the City violated its obligations.

2. A preliminary and permanent injunction prohibiting the City from applying or otherwise enforcing any part of Measure B to SJPOA members working for the City before June 5, 2012;

3. For any and all actual, consequential, and incidental damages as against the City according to proof, including but not limited to damages that have been or may be suffered by members of SJPOA and all costs incurred by SJPOA in attempting to enforce the constitutional and statutory rights of the association and its members;

4. For attorneys' fees as against the City pursuant to California Code of Civil Procedure section 1021.5, Government Code section 800, or otherwise;

\\

\\

\\

\\

5. For costs of suit herein incurred; and,

6. For such costs and further relief as the Court deems just and proper.

Dated: July 5, 2012

CARROLL, BURDICK & McDONOUGH LLP

By _____

Gregg McLean Adam
Jonathan Yank
Gonzalo C. Martinez
Jennifer S. Stoughton
Amber L. West
Attorneys for Plaintiff
San Jose Police Officers' Association

Arthur A. Hartinger (SBN: 121521)
ahartinger@meyersnave.com
Linda M. Ross (SBN: 133874)
lross@meyersnave.com
Jennifer L. Nock (SBN: 160663)
jnock@meyersnave.com
Michael C. Hughes (SBN: 215694)
mhughes@meyersnave.com
MEYERS, NAVE, RIBACK, SILVER & WILSON
555 12th Street, Suite 1500
Oakland, California 94607
Telephone: (510) 808-2000
Facsimile: (510) 444-1108

Attorneys for Defendant
City of San Jose

IN THE SUPERIOR COURT FOR THE

COUNTY OF SANTA CLARA

SAN JOSE POLICE OFFICERS' ASSOCIATION, Plaintiff, v. CITY OF SAN JOSE AND BOARD OF ADMINISTRATORS FOR POLICE AND FIRE DEPARTMENT RETIREMENT PLAN OF CITY OF SAN JOSE, Defendants.	Case No. 112CV225926 **ANSWER OF DEFENDANT CITY OF SAN JOSE TO THE FIRST AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF** Complaint Filed: June 6, 2012 Trial Date: None Set

Defendant City of San Jose ("City") answers and responds to the First Amended Complaint for Declaratory and Injunctive Relief ("First Amended Complaint") filed by Plaintiff San Jose Police Officers' Association ("Plaintiff") as follows:

GENERAL DENIAL

Under the provisions of Section 431.30 of the California Code of Civil Procedure, Defendant denies each and every allegation in the First Amended Complaint for Declaratory and Injunctive Relief, and further denies that Plaintiff has been damaged or harmed in any way. Defendant specifically avers that all rights due to Plaintiff were observed, and that there is no basis to award declaratory relief, injunctive relief, or any relief whatsoever.

FOR THEIR AFFIRMATIVE DEFENSES, DEFENDANT ALLEGES AS FOLLOWS:

FIRST AFFIRMATIVE DEFENSE

1. Plaintiff is not entitled to injunctive relief under California Code of Civil Procedure section 526. (See, e.g., Code Civ. Proc. § 526, subd. (a)(4) & (5), subd. (b)(4), (6) & (7).)

SECOND AFFIRMATIVE DEFENSE

2. Plaintiff is not entitled to declaratory relief under California Code of Civil Procedure sections 1060 and 1061, on the ground that the City had already filed a request for declaratory relief in the United States District Court for the Northern District of California, Case No. C12-02904 LHK PSG, related to the validity of Measure B before implementation, such that declaratory relief here is not necessary or proper under the circumstances.

THIRD AFFIRMATIVE DEFENSE

3. Plaintiff's causes of action, and each of them, should be stayed or dismissed on the ground that they arise from the same nucleus of operative facts and circumstances currently being litigated in Case No. C12-02904 LHK PSG, captioned *City of San Jose v. San Jose Police Officers' Association, et al.*, in the United States District Court for the Northern District of California.

FOURTH AFFIRMATIVE DEFENSE

4. Plaintiff fails to state facts sufficient to constitute grounds for granting any relief to Plaintiff under statutes upon which Plaintiff relies.

FIFTH AFFIRMATIVE DEFENSE

5. Plaintiff's causes of action, and each of them, are barred on the grounds that Plaintiff may not bring actions, or obtain the requested relief, directly under the specified sections of the California Constitution.

SIXTH AFFIRMATIVE DEFENSE

6. Plaintiff's causes of action, and each of them, are barred on the ground that if Plaintiff, or any of them, had a vested right to any of the benefits alleged in the First Amended Complaint (although such is not admitted hereby or herein), then any modification alleged in the First Amended Complaint is reasonable, in that it is in accord with changing conditions and at the

same time maintains the integrity of the City's retirement system, bears some material relation to the theory of a pension system and its successful operation, and to the extent they result in disadvantage to Plaintiff (although such is not admitted hereby or herein) it was accompanied by comparable new advantages.

SEVENTH AFFIRMATIVE DEFENSE

7. Plaintiff's first and six causes of action, for impairment and breach of contract, are barred on the ground that no contract existed for all or some of the terms Plaintiff alleges.

EIGHTH AFFIRMATIVE DEFENSE

8. Plaintiff's first cause of action, for impairment of contract, is barred on the ground that any impairment of Plaintiff's contractual rights (although such is not admitted hereby or herein) was not substantial.

NINTH AFFIRMATIVE DEFENSE

9. Plaintiff's first cause of action, impairment of contract, is barred on the ground that any contractual impairment (although such is not admitted hereby or herein) was reasonable and necessary to serve an important public purpose, including without limitation, insuring the solvency and actuarial soundness of the City's retirement plans.

TENTH AFFIRMATIVE DEFENSE

10. Plaintiff's causes of action, and each of them, are barred on the ground that the Plaintiffs failed to file a government claim pursuant to California Government Code § 945.4 for damages sought in the prayer for relief, including "any and all actual, consequential and incidental damages according to proof, including but not limited to damages that have been or made [sic] be suffered by plaintiffs and petitioners..." See *Sappington v. Orange Unified School Dist.*, 119 Cal.App.4th 949, 955, 14 Cal.Rptr.3d 764 (2004).

ELEVENTH AFFIRMATIVE DEFENSE

11. Plaintiff's causes of action, and each of them, are barred on the ground that they are premature and not ripe for adjudication.

///

///

TWELFTH AFFIRMATIVE DEFENSE

12. Plaintiff's causes of action, and each of them, are barred by the privileges and immunities applicable to public agencies and employees, including without limitation California Government Code §§ 815, 815.2, 815.6, 818, 818.2, 818.8, 820.4, 820.2, 820.6, 820.8, 821, and 822.2.

THIRTEENTH AFFIRMATIVE DEFENSE

13. Plaintiff's causes of action, and each of them, are barred on the ground that Plaintiffs lack standing, in whole or in part, to assert the claims alleged in the First Amended Complaint.

FOURTEENTH AFFIRMATIVE DEFENSE

14. Plaintiff's causes of action, and each of them, as pled in the First Amended Complaint are uncertain.

FIFTEENTH AFFIRMATIVE DEFENSE

15. Plaintiff's causes of action, and each of them, are barred on the ground that Defendant exercised reasonable diligence to discharge any mandatory duty it may have had with respect to Plaintiff.

SIXTEENTH AFFIRMATIVE DEFENSE

16. Defendant's actions were based on good, sufficient, and legal cause, upon reasonable grounds for belief in their justification, and were taken in good faith and without malice.

SEVENTEENTH AFFIRMATIVE DEFENSE

17. Plaintiff's causes of action, and each of them, are barred by the doctrine of separation of powers in that a court cannot find a vested contractual right in the absence of clear legislative intent to create one.

EIGHTEENTH AFFIRMATIVE DEFENSE

18. Plaintiff's claims are barred by laches, waiver, estoppel, and/or the statute of limitations: Cal. Civ. Proc. Code § 339 (2 years for unwritten contract); Cal. Civ. Proc. Code § 342 (referral to Government Claims Act); Cal. Gov. Code § 911.2 (6 mos. to 1 year to file claims);

Cal. Gov. Code § 945.6 (time to file after claim filed); Cal. Gov. Code § 3500 et seq. (6 mos).

NINETEENTH AFFIRMATIVE DEFENSE

19. Plaintiff is not entitled to the relief requested on the ground that it would compel an illegal act or violation of duty by a public officer or official.

TWENTIETH AFFIRMATIVE DEFENSE

20. Plaintiff is not entitled to the relief requested on the ground that it would compel Defendant to exercise its discretionary and/or legislative power in a particular manner.

TWENTY-FIRST AFFIRMATIVE DEFENSE

21. Plaintiff is not entitled to the relief requested on the ground that it would abrogate the City's municipal and police powers granted by the California and United States Constitutions and by the San Jose City Charter.

TWENTY-SECOND AFFIRMATIVE DEFENSE

22. If Defendant's current or former employees or officers or any of them made promises or representations alleged in the First Amended Complaint, although such is not admitted hereby or herein, such statements were made outside the scope of employment and not by agents of Defendant and, thus, Defendant is not liable for such acts.

TWENTY-THIRD AFFIRMATIVE DEFENSE

23. To the extent Plaintiff is able to prove its claims, although such is not admitted hereby or herein, Plaintiff had a duty to mitigate any damages to which it might have been entitled, but failed to do so.

TWENTY-FOURTH AFFIRMATIVE DEFENSE

24. Plaintiff fails to state facts or statutory authority sufficient to entitle it to recover attorneys' fees. Plaintiff is not entitled to attorney's fees under California Civil Code section 52.1, Civil Procedure Code section 1021.5, Government Code section 800, or any other statute.

TWENTY-FIFTH AFFIRMATIVE DEFENSE

25. Plaintiff fails to state facts sufficient to constitute grounds to grant the costs of suit incurred herein or for any other relief.

///

TWENTY-SECOND AFFIRMATIVE DEFENSE

26. Defendant reserves the right to amend this Answer to assert additional affirmative defenses and to supplement, alter or change the Answer and defenses upon revelation of more definitive facts, and upon the undertaking of discovery and investigation in this matter.

PRAYER FOR RELIEF

WHEREFORE, Defendant respectfully prays for relief as hereinafter set forth:

1. That all relief requested in the First Amended Complaint be denied with prejudice;
2. That Plaintiff take nothing by its action;
3. That judgment be entered in Defendant's favor;
4. That Defendant be awarded all costs of suit, including reasonable attorneys' fees; and
5. Such further and other relief as the Court deems just and proper.

DATED: August 6, 2012

MEYERS, NAVE, RIBACK, SILVER & WILSON

By: _____

Arthur A. Hartinger
Linda M. Ross
Jennifer L. Nock
Michael C. Hughes
Attorneys for Defendant City of San Jose

1947225.1

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF ALAMEDA

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the County of Alameda, State of California. My business address is 555 12th Street, Suite 1500, Oakland, CA 94607.

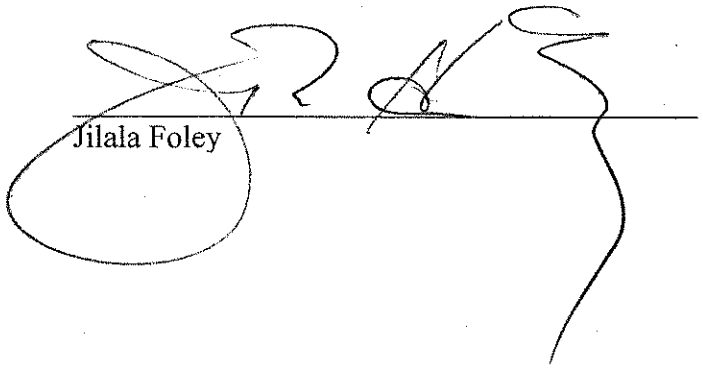
On August 6, 2012, I served true copies of the following document described as **ANSWER OF DEFENDANT CITY OF SAN JOSE TO THE FIRST AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Meyers, Nave, Riback, Silver & Wilson's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on August 6, 2012, at Oakland, California.



Jilala Foley

SERVICE LIST

John McBride Christopher E. Platten Mark S. Renner WYLIE, MCBRIDE, PLATTEN & RENNER 2125 Canoas Garden Avenue, Suite 120 San Jose, CA 95125b	*Attorneys for Plaintiffs/Petitioners, ROBERT SAPIEN, MARY MCCARTHY, THANH HO, RANDY SEKANY AND KEN HEREDIA (Santa Clara Superior Court Case No. 112CV225928)* *AND* *Defendant, SAN JOSE FIREFIGHTERS, I.A.F.F. LOCAL 230 (U.S. Northern District Court Case No. 5:12-CV-2904-LHK)* *AND* *Plaintiffs/Petitioners, JOHN MUKHAR, DALE DAPP, JAMES ATKINS, WILLIAM BUFFINGTON AND KIRK PENNINGTON (Santa Clara Superior Court Case No. 112CV226574)* *AND* *Plaintiffs/Petitioners, TERESA HARRIS, JON REGER, MOSES SERRANO (Santa Clara Superior Court Case No. 112CV226570)* *AND* *Defendant, CITY ASSOC. OF MANAGEMENT. PERSONNEL, IFPTE, LOCAL 21(U.S. Northern District Court Case No. 5:12-CV-2904-LHK)* *AND* *Defendant, THE INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL NO. 3 (U.S. Northern District Court Case No. 5:12-CV-2904-LHK)*
Gregg McLean Adam Jonathan Yank Gonzalo Martinez Jennifer Stoughton CARROLL, BURDICK & MCDONOUGH, LLP 44 Montgomery Street, Suite 400 San Francisco, CA 94104	*Attorneys for Plaintiff, SAN JOSE POLICE OFFICERS' ASSOC. (Santa Clara Superior Court Case No. 112CV225926)* *AND* *Defendant, SAN JOSE POLICE OFFICERS' ASSOC. (U.S. Northern District Court Case No. 5:12-CV-2904-LHK)*

Teague P. Paterson Vishtap M. Soroushian BEESON, TAYER & BODINE, APC Ross House, 2nd Floor 483 Ninth Street Oakland, CA 94607-4051	Attorneys for Defendant, AFSCME LOCAL 101 MUNICIPAL EMPLOYEES FEDERAL AFSCME, LOCAL 101(U.S. Northern District Court Case No. 5:12-CV-2904-LHK) AND Plaintiff, AFSCME LOCAL 101 (Santa Clara County Superior Court Case No. 112CV227864)
Harvey L. Leiderman REED SMITH, LLP 101 Second Street, Suite 1800 San Francisco, CA 94105	Attorneys for Defendant, CITY OF SAN JOSE, BOARD OF ADMINISTRATION FOR POLICE AND FIRE DEPARTMENT RETIREMENT PLAN OF CITY OF SAN JOSE (Santa Clara Superior Court Case No. 112CV225926) AND Necessary Party in Interest, THE BOARD OF ADMINISTRATION FOR THE 1961 SAN JOSE POLICE AND FIRE DEPARTMENT RETIREMENT PLAN (Santa Clara Superior Court Case No. 112CV225928) AND Necessary Party in Interest, THE BOARD OF ADMINISTRATION FOR THE 1975 FEDERATED CITY EMPLOYEES' RETIREMENT PLAN (Santa Clara Superior Court Case Nos. 112CV226570 and 112CV226574) AND Necessary Party in Interest, THE BOARD OF ADMINISTRATION FOR THE FEDERATED CITY EMPLOYEES RETIREMENT PLAN (Santa Clara Superior Court Case No. 112CV227864)

1944219.1

Gregg McLean Adam, No. 203436
Jonathan Yank, No. 215495
Gonzalo C. Martinez, No. 231724
Amber L. West, No. 245002
CARROLL, BURDICK & McDONOUGH LLP
Attorneys at Law
44 Montgomery Street, Suite 400
San Francisco, CA 94104
Telephone: 415.989.5900
Facsimile: 415.989.0932
Email: gadam@cbmlaw.com

Attorneys for Plaintiff
San Jose Police Officers' Association

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SANTA CLARA

SAN JOSE POLICE OFFICERS' ASSOCIATION,

Plaintiff,

v.

CITY OF SAN JOSE, BOARD OF ADMINISTRATION FOR POLICE AND FIRE DEPARTMENT RETIREMENT PLAN OF CITY OF SAN JOSE, and DOES 1-10, inclusive,

Defendants.

No. 1-12-CV-225926
(and Consolidated Actions
1-12-CV-225928, 1-12-CV-226570,
1-12-CV-226574, and 1-12-CV-227864)

[PROPOSED] ORDER DENYING STAY AND GRANTING IN PART MOTION TO CONSOLIDATE

BY FAX

The Motion to Consolidate and Stay State-Court Actions, brought by Defendant City of San Jose, came before this Court on a regularly-scheduled hearing in Department 2 on August 23, 2012, the Honorable Patricia Lucas presiding. Arthur A. Hartinger and Michael C. Hughes of Meyers, Nave, Riback, Silver & Wilson, appeared on behalf of Defendants City of San Jose (the "City") and Debra Figone, in her official capacity as City Manager, in all actions. Christopher E. Platten, of Wylie, McBride, Platten & Renner, appeared on behalf of plaintiffs and petitioners in *Sapien v. City of San Jose*, No. 1-12-CV-225928 ("*Sapien*"), *Harris v. City of San Jose*, No. 1-12-CV-226570 ("*Harris*"), and *Mukhar v. City of San Jose,* No. 1-12-CV-226574 ("*Mukhar*"). Vishtasp M. Soroushian, of Beeson, Tayer & Bodine, APC, appeared on behalf of plaintiff and petitioner AFSCME Local 101 in *American Federation of State, County, and Municipal Employees, Local 101 v. City of San Jose*, No. 1-12-CV-227864 ("*AFSCME*"). Gregg McLean Adam, of Carroll Burdick & McDonough LLP, appeared on behalf of Plaintiff San Jose Police Officers' Association in *SJPOA v. City of San Jose*, No. 1-12-CV-225926 ("*SJPOA*"). Harvey L. Leiderman, of Reed Smith, LLP, appeared telephonically on behalf of "Necessary Parties in Interest" Boards of Administration for the San Jose Police and Fire Department Retirement Plan and the Federated City Employees' Retirement Plan.

In these opposed motions, Defendant City of San Jose moved to consolidate these related cases for all purposes, and further moved to stay these cases in favor of a case it filed in federal district court, *City of San Jose v. San Jose Police Officers' Association*, N.D. Cal. case no. 5:12-cv-02904-LHK.

Having considered the parties' submissions, the arguments of counsel at the hearing, and the record in this case, and good cause appearing: THE COURT ORDERS that the City of San Jose's motion to stay is DENIED for the reasons stated on the record at the hearing on the motion.

IT IS FURTHER ORDERED THAT the City's Motion to Consolidate is GRANTED in part, without prejudice to renewal of the motion at trial to consolidate for

trial purposes. The lead case shall be *SJPOA v. City of San Jose*, Case No. 1-12-CV-225926. Cases Nos. 1-12-CV-225926 ("*SJPOA*"), 1-12-CV-225928 ("*Sapien*"), 1-12-CV-226570 ("*Harris*"), 1-12-CV-226574 ("*Mukhar*"), and 1-12-CV-227864 ("*AFSCME*") are hereby consolidated with Case No. 1-12-CV-225926 only for pre-trial purposes. All future discovery and pleadings in these matters shall bear Case No. 1-12-CV-225926 and shall be filed in that action.

IT IS FURTHER ORDERED that the parties shall meet and confer concerning case management and details of the consolidation. The parties shall file a proposed stipulation and order concerning case management by September 25, 2012. If the parties are unable to reach agreement, they shall file a joint case management conference statement outlining the areas of agreement and disagreement by September 25, 2012.

AND IT IS FURTHER ORDERED THAT the initial case management conference is set for October 9, 2012 at 10 a.m. in Department 2.

IT IS SO ORDERED.

Dated: 9-17-12

Patricia M. Lucas

Hon. Patricia Lucas
Judge of the Superior Court
of Santa Clara County

APPROVED AS TO FORM AND CONTENT:

Dated: September 12, 2012

MEYERS, NAVE, RIBACK, SILVER & WILSON

By _____
Arthur A. Hartinger

Attorneys for Defendants City of San Jose and Debra Figone, in her official capacity as City Manager

Dated: September __, 2012

WYLIE, MCBRIDE, PLATTEN & RENNER

By _____
John McBride
Christopher E. Platten
Attorneys for Plaintiffs in *Sapien, Harris* and *Mukhar*

Dated: September 12, 2012

BEESON, TAYER & BODINE, APC

By _____
Teague P. Paterson
Vishtasp M. Soroushian
Attorneys for Plaintiffs in *AFSCME*

APPROVED AS TO FORM AND CONTENT:

Dated: September __, 2012

MEYERS, NAVE, RIBACK, SILVER & WILSON

By _____
Arthur A. Hartinger

Attorneys for Defendants City of San Jose and Debra Figone, in her official capacity as City Manager

Dated: September 12, 2012

WYLIE, MCBRIDE, PLATTEN & RENNER

By _____
John McBride
Christopher E. Platten

Attorneys for Plaintiffs in *Sapien, Harris* and *Mukhar*

Dated: September 12, 2012

BEESON, TAYER & BODINE, APC

By _____
Teague P. Paterson
Vishtasp M. Soroushian

Attorneys for Plaintiffs in *AFSCME*

Dated: September 12, 2012

REED SMITH

By /s/ Harvey L. Liederman
Harvey Liederman
Attorneys for Necessary Parties Board of Administration of the Federated City Employees' Retirement Plan and the Board of Administration for the San Jose Police and Fire Department Retirement Plan

Dated: September 12, 2012

CARROLL, BURDICK & McDONOUGH LLP

By /s/
Gregg McLean Adam
Jonathan Yank
Gonzalo C. Martinez
Amber L. West
Attorneys for Plaintiff in *SJPOA*

Arthur A. Hartinger (SBN: 121521)
ahartinger@meyersnave.com
Linda M. Ross (SBN: 133874)
lross@meyersnave.com
Jennifer L. Nock (SBN: 160663)
jnock@meyersnave.com
Michael C. Hughes (SBN: 215694)
mhughes@meyersnave.com
MEYERS, NAVE, RIBACK, SILVER & WILSON
555 12th Street, Suite 1500
Oakland, California 94607
Telephone: (510) 808-2000
Facsimile: (510) 444-1108

Attorneys for Defendant
City of San Jose

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SANTA CLARA

SAN JOSE POLICE OFFICERS' ASSOCIATION, Plaintiff, v. CITY OF SAN JOSE, BOARD OF ADMINISTRATION FOR POLICE AND FIRE RETIREMENT PLAN OF CITY OF SAN JOSE, and DOES 1-10 inclusive. Defendants, AND RELATED CROSS-COMPLAINT AND CONSOLIDATED ACTIONS	**Case No. 1-12-CV-225926** *[Consolidated with Case Nos. 112CV225928, 112CV226570, 112CV226574, 112CV227864]* *Assigned for all purposes to the Honorable Patricia M. Lucas* **NOTICE OF MOTION AND MOTION FOR JUDGMENT ON THE PLEADINGS AS TO THE SAN JOSE POLICE OFFICERS' ASSOCIATION'S SEVENTH CAUSE OF ACTION FOR VIOLATION OF THE MEYERS-MILIAS-BROWN ACT** Date: January 17, 2013 Time: 9:00 a.m. Courtroom: 2 Complaint Filed: June 6, 2012 Trial Date: None Set

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on January 17, 2013 at 9:00 a.m. in Department 2 of the above-entitled Court, located at 191 North First Street San Jose, California 95113, or as soon thereafter as the matter may be heard, Defendant City of San Jose ("City") moves for judgment on the pleadings pursuant to Section 438 of the Code of Civil Procedure as to the Seventh Cause of

Action brought by the San Jose Police Officers' Association for violation of the Meyers-Milias-Brown Act.

The City's motion is based on this Notice and Motion, the accompanying Memorandum of Points and Authorities, the accompanying Request For Judicial Notice, all other pleadings and papers on file in this action, and such other and further argument and matters subject to judicial notice as shall be received by the Court at the time of the hearing.

The City has provided a proposed order that grants the motion.

DATED: November 28, 2012

MEYERS, NAVE, RIBACK, SILVER & WILSON

By: _____

Arthur A. Hartinger
Linda M. Ross
Jennifer L. Nock
Michael C. Hughes
Attorneys for Defendant
City of San Jose

2009912.1

Arthur A. Hartinger (SBN: 121521)
ahartinger@meyersnave.com
Linda M. Ross (SBN: 133874)
lross@meyersnave.com
Jennifer L. Nock (SBN: 160663)
jnock@meyersnave.com
Michael C. Hughes (SBN: 215694)
mhughes@meyersnave.com
MEYERS, NAVE, RIBACK, SILVER & WILSON
555 12th Street, Suite 1500
Oakland, California 94607
Telephone: (510) 808-2000
Facsimile: (510) 444-1108

Attorneys for Defendant
City of San Jose

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SANTA CLARA

SAN JOSE POLICE OFFICERS' ASSOCIATION,

Plaintiff,

v.

CITY OF SAN JOSE, BOARD OF ADMINISTRATION FOR POLICE AND FIRE RETIREMENT PLAN OF CITY OF SAN JOSE, and DOES 1-10 inclusive.

Defendants,

AND RELATED CROSS-COMPLAINT AND CONSOLIDATED ACTIONS

Case No. 1-12-CV-225926

[Consolidated with Case Nos. 112CV225928, 112CV226570, 112CV226574, 112CV227864]

Assigned for all purposes to the Honorable Patricia M. Lucas

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT CITY OF SAN JOSE'S MOTION FOR JUDGMENT ON THE PLEADINGS AS TO THE SAN JOSE POLICE OFFICERS' ASSOCIATION'S SEVENTH CAUSE OF ACTION FOR VIOLATION OF THE MEYERS-MILIAS-BROWN ACT

Date: January 17, 2013
Time: 9:00 a.m.
Courtroom: 2

Complaint Filed: June 6, 2012
Trial Date: None Set

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

The City of San Jose ("the City" or "San Jose") brings this motion for judgment on the pleadings pursuant to Section 438 of the Code of Civil Procedure as to the Seventh Cause of Action brought by the San Jose Police Officers' Association ("SJPOA") for violation of the Meyers-Milias-Brown Act ("MMBA").

I. INTRODUCTION

On June 5, 2012, the voters of San Jose enacted Measure B, which amended the San Jose City Charter to reform employee retirement benefits, lower retirement costs and preserve essential City services. The SJPOA and others sued the City over the legality of Measure B in five separate actions, which this Court ordered consolidated for pretrial purposes. The SJPOA is the only plaintiff to bring a claim under the MMBA in these consolidated actions.

In its Seventh Cause of Action, the SJPOA brings both "substantive" and "procedural" claims for violation of the MMBA. The SJPOA claims that two provisions of "Measure B" – increased employee contributions to pensions and retiree health care – violate the MMBA because their presence in the City Charter may make them no longer subject to negotiation in a memorandum of understanding between the City and the union.

The SJPOA fails to state a claim for violation of the MMBA. The MMBA does not contain any "substantive" requirements for terms and conditions of public employment. The MMBA's requirements are purely procedural. In this instance, the SJPOA can litigate whether the City satisfied the MMBA's procedural requirements only by bringing a *quo warranto* action.

Under the California Constitution, charter cities have the authority to set terms and conditions of employment for city employees in their charters. The California Supreme Court has held, on numerous occasions, that this authority is compatible with the MMBA. *See, City and County of San Francisco v. Cooper*, 13 Cal. 3d 898 (1975); *Building Material & Construction Teamsters' Union v. Farrell*, 41 Cal. 3d 651 (1986); and *People ex rel. Seal Beach Police Officers' Assn. v. City of Seal Beach*, 36 Cal. 3d 591 (1984).

Under *Seal Beach*, a charter city satisfies the MMBA's procedural requirements when it meets and confers with employee organizations before making a decision to place a matter on the ballot. Relying on *Seal Beach*, the Court of Appeal in *United Public Employees v. City and*

County of San Francisco, 190 Cal. App. 3d 419 (1987), specifically held that the MMBA is not violated when a city charter requires that changes in certain terms and conditions of employment be enacted by the voters.

Based on these authorities, the SJPOA cannot state a "substantive" claim for violation of the MMBA, but only a procedural claim – that the City of San Jose failed to adequately meet and confer before placing Measure B on the ballot. The City in fact did meet and confer with the SJPOA and other employee organizations. However, the exclusive remedy for claim of failure to meet and confer before placing a measure on the ballot is an action brought in *quo warranto*, which requires the permission of the Attorney General. *International Assn. of Fire Fighters v. City of Oakland,* 174 Cal. App. 3d 687 (1985).

This is not a *quo warranto* action, and although the SJPOA filed an application with the Attorney General for permission to file a *quo warranto* action, the Attorney General has not granted the application. Significantly, to bolster its application to the Attorney General, the SJPOA asserted that the instant case involves only a "substantive" MMBA claim – which as demonstrated below does not exist. The SJPOA further asserted that the only remedy for a "procedural" violation of the MMBA is a *quo warranto* action – expressly admitting that it could not bring such a procedural claim as part of this action.

Based on the above legal principles, this Court should grant judgment on the pleadings, and dismiss with prejudice, the SJPOA's Seventh Cause of Action for a "substantive and procedural" violation of the MMBA.

II. STATEMENT OF FACTS

A. Measure B.

On June 5, 2012, San Jose city voters enacted Measure B, an amendment to the San Jose City Charter entitled: "The Sustainable Retirement Benefits and Compensation Act." (Request for Judicial Notice, Exh. A.) The "Findings" for the Act state that the City's ability to provide its citizens with "Essential City Services" – such as police and fire protection, street maintenance and libraries – is threatened by rising costs for city employee retirement benefits. (Section 1501-A.) The stated "Intent" of the Act is to "ensure the City can provide reasonable and

sustainable post-employment benefits while at the same time delivering Essential City Services." (Section 1502-A.)[1]

B. The SJPOA's Complaint.

The SJPOA filed its Complaint For Declaratory and Injunctive Relief on June 6, 2012, the day after the June 5 election. The Complaint includes a Seventh Cause of Action for "Violation of MMBA, Gov. Code § 3512 *et. seq.*" The SJPOA complaint is one of five state court challenges to Measure B which this Court consolidated for pretrial purposes. Only the SJPOA brings a claim for violation of the MMBA.

The SJPOA's Seventh Cause of Action for violation of the MMBA places at issue two provisions of Measure B: Sections 1506-A (Current Employees), and 1512-A (a) (Retiree Healthcare – Minimum Contributions).

Section 1506-A. Section 1506-A provides that unless Current Employees opt-in to an alternative, lower cost retirement plan (called the Voluntary Election Program or "VEP"), they "shall have their compensation adjusted through additional retirement contributions in increments of 4% of pensionable pay per year, up to a maximum of 16%, but no more than 50% of the costs to amortize any pension unfunded liabilities …." If the VEP "has not been implemented for any reason, the compensation adjustments shall apply to all Current Employees." (RJN, Exh. A)

Plaintiff SJPOA's Seventh Cause of Action alleges that: "Section 1506-A of Measure B violates the MMBA both substantively and procedurally because it directs that the City shall unilaterally reduce salaries by as much as 16% if the VEP is 'illegal, invalid or unenforceable as to Current Employees,' without requiring the City to bargain over such reductions and/or even if bargaining were to take place it makes the amount of salary reductions non-negotiable." (SJPOA Compl., ¶ 105.)

---

[1] Measure B includes provisions that require employees to pay increased pension contributions towards system unfunded liabilities, authorize an alternative lower cost pension plan, provide a "Tier 2" pension plan for new employees, confirms the Municipal Code requirement that employees to pay equally towards retiree healthcare, modify the basis for disability retirements, grant the City Council authority to suspend COLA payments in the event of an emergency, discontinue the supplemental retiree benefit reserve, and require retirement plans to be actuarially sound, among others. (RJN, Exh. A)

Section 1512-A. Section 1512-A requires: "Existing and new employees must contribute a minimum of 50% of the cost of retiree healthcare, including both normal cost and unfunded liabilities." (RJN, Exh. A)

The Seventh Cause of Action alleges: "Section 1512-A violates the MMBA both substantively and procedurally because it unilaterally effects an increase in employee contributions for retiree healthcare benefits, and consequently, reduces net salaries. It also violates the MMBA because it effectively eliminates the SJPOA's ability to bargain with the City over retiree healthcare benefits, when such benefits are a mandatory subject of bargaining under the MMBA." (SJPOA Compl., ¶ 106.)

The SJPOA, however, does not claim that the City has violated the SJPOA's current memorandum of agreement with the City. Consistent with the Municipal Code, the MOA already requires SJPOA members to cost share with the City for retiree healthcare benefits.

C. The SJPOA's Application To File A *Quo Warranto* Action.

In June 2012, the SJPOA filed an application with the California Attorney General for leave to file a *quo warranto* action to invalidate Measure B based on the City's failure to adequately meet and confer before placing Measure B on the ballot.[2] (RJN, Exhs. B-E.) The Proposed Verified Complaint includes a claim that: "The Defendants Violated The Meyers-Milias-Brown Act, Government Code 3500 *et. seq.*, by Deciding To Place Measure B Before the Voters Without First Providing the SJPOA With Notice and an Opportunity to Bargain." (Verified Complaint at p. 6). The Verified Complaint asks for a judgment declaring Measure B "null and void and of no legal effect ...." (*Id.*, Exh. D at p. 15.) On September 28, 2012, the SJPOA sent a letter to the Attorney General's Office asserting that the instant Superior Court action "does not and cannot (for the reasons stated supra) attack the procedural validity" of Measure B and therefore "does not address and cannot redress the violations of the Meyers-Milias-

[2] The SJPOA filed a Notice of Application For Leave To Sue In *Quo Warranto*, an Application For Leave To Sue in *Quo Warranto*, a Proposed Verified Complaint, a Verified Statement of Facts In Support of the Application, and a Memorandum of Points and Authorities. The City has not attached the Verified Statement of Facts as an Exhibit to the Request For Judicial Notice due to its volume.

Brown Act ('MMBA') (Gov. Code 3500 *et. seq.*) at issue in the SJPOA's proposed *quo warranto* action." (RJN, Exh. F)

III. ARGUMENT

A defendant may bring a motion for judgment on the pleadings on the same grounds as a general demurrer, but the motion may be made after the time for filing the demurrer has expired. Code of Civil Procedure § 438(c); *Stoops v. Abbassi*, 100 Cal. App. 4th 644, 650 (2002). The grounds for a motion for judgment on the pleadings must appear on the face of the challenged pleading or, in the alternative, may be based on facts which the Court may judicially notice. Code of Civil Procedure § 438(d). The City brings this motion under Code of Civil Procedure § 438(c)(1)(B)(ii) because the SJPOA's Seventh Cause of Action "does not state facts sufficient to constitute a cause of action" against the City.

A. Plaintiff Cannot State A Substantive Claim Under The MMBA

The SJPOA Complaint alleges that Measure B violates the MMBA "both substantively and procedurally." However, the MMBA does not contain substantive requirements. Plaintiff's only potential cause of action is for a violation of the MMBA's procedural requirements: that the City failed to engage in adequate meet and confer before placing Measure B on the ballot. As established below, this assertion – which is not supported by the facts – can only be litigated in a *quo warranto* action, not here.

1. The MMBA Does Not Contain Substantive Requirements.

Public sector collective bargaining statutes, like the MMBA, contain only procedural requirements. Therefore, the SJPOA cannot bring a cause of action under the MMBA for violation of its "substantive" requirements.

The Legislature enacted the MMBA to "provid[e] a reasonable method of resolving disputes regarding wages, hours, and other terms and conditions of employment between public employers and public employee organizations." Gov. Code § 3500, subd. (a). To this end, the MMBA requires public employers to "meet and confer in good faith" with recognized employee organizations on matters within the "scope of representation," including "wages, hours and other terms and conditions of employment." Gov. Code §§ 3504, 3505. Where the parties are able to

reach agreement, they prepare a "memorandum of understanding" which must be adopted by the public agency's governing body in order to be binding. Gov. Code § 3505.1. If no agreement is reached, however, the governmental body has the authority to implement its last best and final offer. Gov. Code § 3505.7; *Seal Beach Police Officers' Assn. v. City of Seal Beach, supra,* 36 Cal. 3d 591, 601 (1984); *County of Sonoma v. Superior Court,* 173 Cal. App. 4th 322, 329 (2009).

Although the MMBA establishes a procedure by which wages, hours, and other terms and conditions of employment are to be set – it does not establish any substantive standards for conditions of employment. *Seal Beach Police Officers' Assn., supra,* 36 Cal. 3d at 597 ["While the Legislature [in enacting the MMBA] established a procedure for resolving disputes regarding wages, hours and other conditions of employment, it did not attempt to establish standards for the wages, hours and other terms and conditions themselves."]; *County of Riverside v. Superior Court,* 30 Cal. 4th 278, 289 (2003) (quotations omitted) ["We have 'emphasize[d] that there is a clear distinction between the substance of a public employee labor issue and the procedure by which it is resolved."]

Based on these authorities, the SJPOA cannot state a claim for a substantive violation of the MMBA. The MMBA contains only procedural, not substantive requirements.

2. Under The MMBA, The City's Only Obligation Before Placing Measure B On The Ballot Was Procedural – To Meet And Confer With The SJPOA.

The SJPOA complains that Measure B provisions that establish increased employee contributions towards pensions (Section 1506-A) and increased employee contributions towards retiree healthcare (Section 1512-A) violate the MMBA because SJPOA will not have the opportunity to bargain over these issues in the future. But Supreme Court and Court of Appeal decisions establish that (1) under the California Constitution, charter cities have authority to set terms and conditions of employment though Charter provisions established by the voters, and (2) under the MMBA, a charter city's only obligation, before placing such a measure on the ballot, is to meet and confer with affected employee organizations.

///

///

(a) Under the California Constitution, the compensation of charter city employees is a matter of local concern.

Under the California Constitution, the compensation of charter city employees is a municipal function that is a matter of local and not statewide concern. Cal. Const.Art. XI, § 5(b)(4); *Sonoma County Organization of Public Employees v. County of Sonoma*, 23 Cal. 3d 296, 317 (1979) ["salaries of local employees of a charter city constitute municipal affairs and are not subject to general laws"]; *accord State Building and Construction Trades Council of California, AFL-CIO v. City of Vista*, 54 Cal. 4th 547 (2012) ["the salaries of charter city employees are a municipal affair and not a statewide concern"]; *see, also*, *County of Riverside v. Superior Court*, *supra*, 30 Cal. 4th at 286-291 [imposition of binding interest arbitration by state legislature violated county's authority to "provide for the … compensation … of employees" under Cal. Const., art. XI, § 1(b)]. Under the "Home Rule" provisions of the state Constitution: "The governing body or charter commission of a county or city may propose a charter or revision. Amendment or repeal may be proposed by initiative or by the governing body." Cal. Const. art. XI, § 3(b).

(b) The MMBA is compatible with voter authority over city charter provisions establishing terms and conditions of employment.

The requirements of the MMBA are compatible with a charter city's authority to establish terms and conditions of employment in its city charter. The MMBA itself states: "Nothing contained herein shall be deemed to supersede the provisions of existing … charters … that establish and regulate a merit or civil service system or which provide for other methods of administering employer-employee relations…." Gov. Code § 3500.

In *City and County of San Francisco v. Cooper,* 13 Cal. 3d 898 (1975), the California Supreme Court rejected a contention that the MMBA meet and confer process was incompatible with charter-required prevailing wage standards. The Court explained: "This, of course, does not mean that the meet and confer process may supplant the charter's prevailing wage guidelines; the [MMBA] itself recognizes the continued validity of such charter provisions." *Id.* at p. 922.

Consistent with the decision in *Cooper*, in *Seal Beach*, the California Supreme Court found no conflict "between the city council's power to propose charter amendments and section 3505 [of the MMBA]." *Seal Beach Police Officers' Assn. v. City of Seal Beach, supra,* 36 Cal. 3d at p.

601. The Supreme Court explained: "Although that section [of the MMBA] encourages binding agreements resulting from the parties' bargaining, the governing body of the agency – here the city council – retains the ultimate power to refuse an agreement and to make its own decision. This power preserves the council's rights under [California Constitution] article XI, section 3, subdivision (b) – it may still propose a charter amendment if the meet and confer process does not persuade it otherwise." *Id.* at p. 601 [citations omitted]. Accordingly, the Court rejected the City's contention that the meet and confer requirement interfered with the City's authority to propose a charter amendment concerning employee discipline. After meeting and conferring, the City was entitled to place the measure on the ballot. *Id.* at p. 600-601.

Subsequently, in *Building Material & Construction Teamsters' Union v. Farrell*, 41 Cal. 3d 651 (1986), the Court reiterated that the MMBA was compatible with city charter provisions that govern terms and conditions of employment – in that case a city charter provision granting the City Civil Service Commission the authority to reclassify positions. The Court explained:

> "It is well settled that statutes should be construed in harmony with other statutes on the same general subject. [citations] . . . The same rule of construction applies to a potential conflict between a statute and a charter provision. The relevant section of the [Charter] clearly gives the civil service commission the authority to 'reclassify' and 'reallocate' employment positions in city government. It is far from clear, however, that this power conflicts with the meet and confer provisions of the MMBA. First, although the MMBA mandates bargaining about certain matters, public agencies retain the ultimate power to refuse to agree on any particular issue. [citation] Thus the power to reclassify employment positions is not necessarily inconsistent with the requirement to meet with employee representatives and confer about reclassifications before the changes are implemented." *Id.* at p. 665.

In finding the City Charter and the MMBA to be compatible, *Farrell* confirmed the Supreme Court's decision in *Seal Beach*, stating: "We held that although the California Constitution (art. XI, §3, subd. (b)) clearly gives cities the right to propose charter amendments, this right is compatible with the mandate to meet and confer before proposing amendments concerning the terms and conditions of public employment." *Id.* at p. 666. Subsequently, in *City and County of San Francisco v. United Assn. of Journeymen*, 42 Cal. 3d 810, 816, n. 5 (1986), the Court reiterated: "City employees are subject to the [provisions of the MMBA], but only to the extent that its provisions are not inconsistent with the [Charter]."

Under these California Supreme Court decisions, the voters of a charter city retain the constitutional authority to adopt a charter amendment that affects the terms and conditions of employment. That authority is subject only to the procedural requirement that the city first meet and confer with affected employee organizations. Therefore, before placing Measure B on the ballot, the City of San Jose's only obligation was to meet and confer with the SJPOA (which it did).

(c) The requirement that changes to charter enacted wages and benefits be submitted to the voters is not inconsistent with the MMBA.

The SJPOA contends that Measure B is invalid under the MMBA because it places certain wage and benefit requirements in the San Jose City Charter, thus removing them from future bargaining without return to the voters. A similar contention was rejected in *United Public Employees v. City and County of San Francisco*, 190 Cal. App. 3d 419 (1987). In *United Public Employees*, the City had informed city unions that the city charter required it to submit any agreement on fringe benefits to the voters for approval. *Id.* at p. 421. According to the Court: "The sole issue is whether the MMBA's 'meet and confer' process is incompatible with the power of the electorate in a charter city to 'reserve the right to either grant or deny' benefits of public employment." *Id.* at p. 422.

Relying on *Seal Beach*, the Court in *United Public Employees* held that nothing in the MMBA prevented the San Francisco City Charter from requiring "voter approval of any 'addition, deletion or modification' of city employee benefits." *Id.* at p. 423. The Court explained: "We agree that the election requirement encumbers the bargaining process and may be a much more expensive adjunct to meet-and-confer negotiations than a simple submission to the board of supervisors. However, the electorate has declined to grant the board this authority, and we do not rule on the wisdom of charter provisions, that matter being entrusted to the voters." *Id.* at p. 425. The Court found that the MMBA's objective to "promote full communication between public employers and their employees" is "served by requiring the public employer to meet and confer with employee representatives before proposing a charter amendment which, as here, concerns the terms and conditions of public employment." *Id.* at p. 425.

A subsequent Supreme Court decision highlights the special status of charter cities under the California Constitution. In *Voters for Responsible Retirement v. Board of Supervisors of Trinity County*, 8 Cal. 4th 765 (1994), the Court examined the authority of the voters in a *general law county* to approve or reject a memorandum of understanding with county employees by referendum. The Court based its decision on Government Code section 25123(e), which lists memoranda of understanding between *counties* and employee organizations as a class of ordinances "specifically required by law to take effect immediately" under Elections Code § 3751(a)(2) and thus not subject to referendum. 8 Cal. 4th at pp. 776-778. The Court held that this exception was justified to advance the MMBA's purpose of promoting collective bargaining agreements. *Id.* at pp. 781-784.

In deciding *Trinity County*, the Supreme Court said nothing to contradict its prior holdings in *Cooper*, *Farrell* and *Seal Beach*, which unlike *Trinity County*, addressed the powers of charter cities. Rather, the Court was careful to distinguish charter cities and their special status under the California Constitution. The Court commented that *United Public Employees* "understated the problematic nature of the relationship between the MMBA and the local referendum power." *Id.* at p. 782. But the Court specifically stated that it was *not deciding* whether "the restriction of the referendum power for ordinances adopting or implementing MOU's applies to cities" or "to a consolidated city and county such as San Francisco." The Court pointed out that Government Code section 25123(e), upon which it relied for its decision, "is applicable to counties only and has no counterpart for cities." *Id.* at pp. 782, nn. 4, 5.

Unlike *Trinity County*, this case does not involve a county, or a referendum over an already approved memorandum of understanding. Rather, this case involves a charter city and a charter amendment enacted by city voters that frames future discussions. By expressly limiting its holding to counties, *Trinity County* highlights the continued viability of Supreme Court opinions holding that, under the California Constitution's grant of plenary authority to charter cities, the voters of charter cities may establish terms and conditions of employment in city charters. All over California, city charters have established wage formulas, pension and other retirement benefits, interest arbitration to resolve disputes, and many other terms and conditions of

employment. To hold that city charters may no longer regulate these topics, because submission of changes to the voters violates the MMBA, would upend decades of judicial authority and established practice.

In summary, by enacting Measure B, the voters added requirements for increased payments by employees to the City Charter. Contrary to the SJPOA's contention, there is no conflict between the MMBA's meet and confer requirement and voter authority over these terms and conditions of employment. Under the California Constitution, and the Supreme Court opinions in *Cooper, Farrell*, and *Seal Beach*, the voters have the authority to establish terms and conditions of employment in a city charter. Under these Supreme Court opinions, the MMBA is satisfied by the process of meet and confer before proposals are considered by the voters.

B. Plaintiff SJPOA's Seventh Cause of Action Must Be Dismissed Because A Claim For Violation Of The MMBA In Placing A Measure On The Ballot Can Be Brought Only In A *Quo Warranto* Action

Plaintiff SJPOA's Seventh Cause Of Action must be dismissed because the sole remedy for an alleged failure to meet and confer over a ballot measure is to file a *quo warranto* action, which requires the permission of the Attorney General. In fact, the SJPOA has filed a separate "Verified Complaint In *Quo Warranto*" with the Attorney General, but the Attorney General has not given the SJPOA permission to sue.

The *quo warranto* complaint procedure is described in Code of Civil Procedure § 803, which states, in relevant part:

> "An action may be brought by the attorney-general, in the name of the people of this state, upon his [or her] own information, or upon a complaint of a private party, against any party who usurps, intrudes into, or unlawfully holds or exercises any public office, civil or military, or any franchise, or against any corporation, either *de jure* or *de facto*, which usurps, intrudes into, or unlawfully holds or exercises any franchise, within this state."

For a private party to file a *quo warranto* action, it must first obtain leave from the Attorney General. *See,* California Code of Regulations, Title 11, § 2 ("the proposed defendant may, within the period provided in Section 3 hereof, show cause, if any he have, why 'leave to sue' should not be granted in accordance with the application therefor.")

Quo warranto is the exclusive legal mechanism for attacking the legitimacy of a City Charter amendment allegedly placed on the ballot in violation of the MMBA. *International Assn. of Fire Fighters v. City of Oakland,* 174 Cal. App. 3d 693-698 (1985). *See Cooper v. Leslie Salt Co.*, 70 Cal. 2d 627, 633 (1969) ("absent constitutional or statutory regulations providing otherwise, *quo warranto* is the only proper remedy in cases in which it is available"); *Oakland Municipal Improvement League v. City of Oakland*, 23 Cal. App. 3d 165, 169 (1972) ("Appellants do not contend that a *quo warranto* proceeding would not be available, nor could they do so. … It follows that such a proceeding is exclusive.")

In *International Association of Fire Fighters v. City of Oakland,* 174 Cal. App. 3d at p. 689-690, employee unions, retirees and taxpayers claimed that two City Charter measures, which negatively affected retirement benefits, were invalid because the City had failed to adequately meet and confer before placing them on the ballot. The Court of Appeal held that "an action in the nature of *quo warranto* constitutes the exclusive method for appellants to mount their attack on the charter amendments based on the city's failure to comply with the Meyers-Milias-Brown Act." *Id* at p. 690.

Recently, in Attorney General Opinion No. 11-702, the Attorney General considered a request by a City of Bakersfield employee union for leave to bring a *quo warranto* action against the City based on the City's alleged failure to meet and confer before placing a pension related measure on the ballot. The measure not only established a new pension benefit formula and contribution levels, it also provided that the new formula and contribution levels could only be amended or repealed by a vote of the electorate. 95 Ops. Cal. Atty. Gen. 31 (2012).

The Attorney General did not reach the merits, concluding "only that a *quo warranto* action is the appropriate legal proceeding in which to resolve this issue." *Id.* at p. 13. The Attorney General relied on *International Association of Fire Fighters,* noting that in *Fire Fighters*, "the Court of Appeal held that *quo warranto* is the *only* legal mechanism for attacking the legitimacy of a charter-amending initiative alleged to have been placed on the ballot in violation of the MMBA." *Id.* at p. 6 [emphasis in original]. In rendering a decision, the Attorney General specifically acknowledged that "because the new rules may not be changed or repealed except by

a vote of the City's electorate, Measure D effectively removes the subject of pension benefit calculation formulas and member contribution levels from future bargaining discussions." *Id.* at p. 7. The Attorney General opinion did not cite this factor as any reason to depart from the established rule that *quo warranto* is the exclusive remedy.

Under *Association of Fire Fighters*, the SJPOA's claim that the City has violated the MMBA procedures must be brought by obtaining leave to file a *quo warranto* action, which is the exclusive method to challenge a Charter measure placed on the ballot in alleged violation of the MMBA. As expressly acknowledged in the Attorney General opinion, the fact that the Charter amendment removes a topic from future bargaining over a memorandum of understanding does not change the rule that *quo warranto* is the exclusive remedy.

Obviously, this is not a *quo warranto* action and therefore the SFPOA's claim for a procedural violation of MMBA must be dismissed.

C. SJPOA'S Pending Application With The Attorney General For Leave To File A *Quo Warranto* Action Admits That *Quo Warranto* Is The Sole Legal Avenue For Its MMBA Procedural Claim.

The SJPOA filed an application for leave to bring a *quo warranto* action which admits that the only avenue for its procedural MMBA claim is a *quo warranto* action -- and not this action.

In June 2012, the SJPOA filed an application with the California Attorney General for leave to file a *quo warranto* action to invalidate Measure B based on the City's failure to adequately meet and confer before placing Measure B on the ballot. (RJN, Exhs. B-E) That application is pending.[3] Recently, the SJPOA responded to an inquiry by the Attorney General's Office requesting information "pertaining to six other legal actions regarding the recently-passed 'Measure B' in the City of San Jose" – which include this action. (RJN, Exh. F)

///

[3] The City opposed the application because the SJPOA could not show a disputed issue of fact or law in light of the City's exhaustive pre-election meet and confer efforts and because a *quo warranto* action would not serve the public interest. The City informed the Attorney General that the SJPOA and other unions had brought other challenges to Measure B – including this action – seeking to invalidate Measure B on a myriad of grounds not limited to the MMBA. The City pointed out that if any of these actions were successful in invalidating Measure B, they would achieve the same relief sought in the *quo warranto* complaint.

In its response, the SJPOA first admitted – citing *International Assoc. of Fire Fighters* – that a *quo warranto* proceeding is the exclusive avenue to attack a municipal charter provision placed on the ballot in violation of the MMBA's procedural meet and confer requirements. (*Id.* at p. 1.) The SJPOA then asserted that that the instant action – Santa Clara Superior Court Case No. 1-12-CV-225926 – was no substitute for a *quo warranto* action because it was brought only to challenge the "substantive legality" of certain provisions of Measure B and "does not and cannot (for the reasons stated supra) attack the procedural validity of Measure B." *Id.* at p. 2.

The SJPOA's response demonstrates why its Seventh Cause of Action fails to state a claim. First, the SJPOA asserted that this action contains only a substantive MMBA challenge to Measure B. As demonstrated above, there is no legal claim for a substantive violation of the MMBA. Second, the SJPOA admitted that any procedural MMBA challenge must be brought through a *quo warranto* action – not this action. Therefore, the SJPOA's Seventh Cause of Action for "substantive and procedural" violations of the MMBA must be dismissed with prejudice.

IV. CONCLUSION

The SJPOA fails to state a claim for "substantive" or "procedural" violations of the MMBA. The MMBA does not contain any "substantive" requirements. Its requirements are purely procedural. In this case, under the MMBA, the City was required only to meet and confer before proposing Measure B to the voters (which the City did). But a *quo warranto* action – which requires the approval of the Attorney General – is the sole remedy for a failure to meet and confer over a proposed charter amendment. The SJPOA applied for leave to file a separate *quo*

///

///

///

///

///

///

///

///

warranto action and admitted, as part of that application, that *quo warranto* is the sole avenue for remedying a procedural violation of the MMBA. Therefore, this Court should grant judgment on the pleadings, with prejudice, on the SJPOA's Seventh Cause of Action for violation of the MMBA.

DATED: November 28, 2012

MEYERS, NAVE, RIBACK, SILVER & WILSON

By: _____

Arthur A. Hartinger
Linda M. Ross
Jennifer L. Nock
Michael C. Hughes
Attorneys for Defendant
City of San Jose

2007182.1

Arthur A. Hartinger (SBN: 121521)
ahartinger@meyersnave.com
Linda M. Ross (SBN: 133874)
lross@meyersnave.com
Jennifer L. Nock (SBN: 160663)
jnock@meyersnave.com
MEYERS, NAVE, RIBACK, SILVER & WILSON
555 12th Street, Suite 1500
Oakland, California 94607
Telephone: (510) 808-2000
Facsimile: (510) 444-1108

Attorneys for Defendant
City of San Jose

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SANTA CLARA

SAN JOSE POLICE OFFICERS ASSOCIATION,

Plaintiff,

v.

CITY OF SAN JOSE, BOARD OF ADMINISTRATION FOR POLICE AND FIRE RETIREMENT PLAN OF CITY OF SAN JOSE, and DOES 1-10 inclusive.,

Defendants.

AND RELATED CROSS-COMPLAINT AND CONSOLIDATED ACTIONS

Case No. 1-12-CV-225926

[Consolidated with Case Nos. 112CV225928, 112CV226570, 112CV226574, 112CV227864]

Assigned for all purposes to the Honorable Patricia M. Lucas

DEFENDANT'S REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF MOTION FOR JUDGMENT ON THE PLEADINGS AS TO THE SAN JOSE POLICE OFFICERS' ASSOCIATION'S SEVENTH CAUSE OF ACTION FOR VIOLATION OF THE MEYERS-MILIAS-BROWN ACT; EXHIBITS A-F IN SUPPORT THEREOF

Date: January 17, 2013
Time: 9:00 a.m.
Dept.: 2

Complaint Filed: June 6, 2012
Trial Date: None Set

Defendant City of San Jose hereby requests the Court to take judicial notice pursuant to California Evidence Code Sections 450 *et seq.*, and in accordance with California Rules of Court 3.1113, subdivision (l) and 3.1306, subdivision (c), of the following material, true and correct copies of which are attached hereto:

Exh. A: Full Text of Measure B: Article XV-A Retirement: Public Employee Pension Plan Amendments – To Ensure Fair and Sustainable Retirement Benefits While Preserving Essential City Services (referred as: "The Sustainable Retirement Benefits and Compensation Act") [City Council Agenda Item No. 3.5(b) discussed on November 6, 2012];

Exh. B: *San Jose Police Officers' Assoc. v. City of San Jose, and City of San Jose City Council*: Notice of Application for Leave to Sue in *Quo Warranto*;

Exh. C: *San Jose Police Officers' Assoc. v. City of San Jose, and City of San Jose City Council*: Application for Leave to Sue in *Quo Warranto*;

Exh. D: *The People of the State of California on the Relation* of *San Jose Police Officers' Association v. City of San Jose, and City Council of San Jose*: Verified Complaint in *Quo Warranto* [Code Civ. Proc. §803; Cal. Code Reg Title 11, Section 2(A)];

Exh. E: *San Jose Police Officers' Association v. City of San Jose, and City of San Jose City Council*: Memorandum of Points and Authorities in Support of SJPOA's Application for Leave to Sue in *Quo Warranto*; and

Exh. F: Letter dated September 28, 2012 regarding "*Quo Warranto* Application in *San Jose Police Officers' Assn. v. City of San Jose and City of San Jose City Council* Your File No.: LA2012106837 File No. 038781" to Marc J. Nolan, Deputy Attorney General from Jonathan Yank of Carroll, Burdick & McDonough LLP.

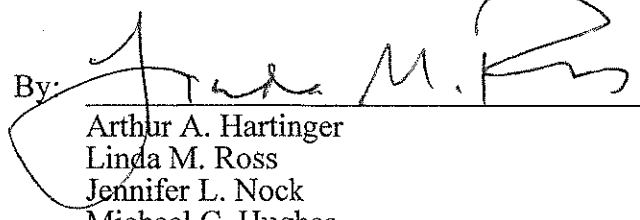
Exhibit A is properly subject to judicial notice pursuant to California Evidence Code Sections 451(a) ("provisions of any charter described in Sections 3, 4, or 5 of Article XI of the California Constitution), 453, and 452(b) (providing that courts may take judicial notice of "legislative enactments issued by or under the authority of the United States or any public entity in the United States."). *Trinity Park, L.P. v. City of Sunnyvale*, 193 Cal. App. 4th 1014, 1027 ("The Evidence Code also expressly provides for judicial notice of a public entity's legislative

enactments and official acts. Thus, we may take notice of local ordinances and the official resolutions, reports, and other official acts of a city."). Exhibits A, B, C, D, and E are properly subject to judicial notice pursuant to California Evidence Code Sections 453 and 452(h) (providing that courts may take judicial notice of "[f]acts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy."). *See also Fontenot v. Wells Fargo Bank, N.A.,* 198 Cal. App. 4th 256, 265 (2011) ("[C]ourts have taken judicial notice not only of the existence and recordation of recorded documents but also of a variety of matters that can be deduced from the documents.").

For these reasons, the City respectfully requests that the Court take judicial notice of the above-listed documents.

DATED: November 28, 2012

MEYERS, NAVE, RIBACK, SILVER & WILSON

By: 

Arthur A. Hartinger
Linda M. Ross
Jennifer L. Nock
Michael C. Hughes
Attorneys for Defendant
City of San Jose

2006567.1

EXHIBIT A

ARTICLE XV-A
RETIREMENT

PUBLIC EMPLOYEE PENSION PLAN AMENDMENTS - TO ENSURE FAIR AND SUSTAINABLE RETIREMENT BENEFITS WHILE PRESERVING ESSENTIAL CITY SERVICES

The Citizens of the City of San Jose do hereby enact the following amendments to the City Charter which may be referred to as: *"The Sustainable Retirement Benefits and Compensation Act."*

Section 1501-A: FINDINGS

The following services are essential to the health, safety, quality of life and well-being of San Jose residents: police protection; fire protection; street maintenance; libraries; and community centers (hereafter "Essential City Services").

The City's ability to provide its citizens with Essential City Services has been and continues to be threatened by budget cuts caused mainly by the climbing costs of employee benefit programs, and exacerbated by the economic crisis. The employer cost of the City's retirement plans is expected to continue to increase in the near future. In addition, the City's costs for other post employment benefits – primarily health benefits – are increasing. To adequately fund these costs, the City would be required to make additional cuts to Essential City Services.

By any measure, current and projected reductions in service levels are unacceptable, and will endanger the health, safety and well-being of the residents of San Jose.

837680_2
Council Agenda: 3/6/12
Item No: 3.5(b)

Without the reasonable cost containment provided in this Act, the economic viability of the City, and hence, the City's employment benefit programs, will be placed at an imminent risk.

The City and its residents always intended that post employment benefits be fair, reasonable and subject to the City's ability to pay without jeopardizing City services. At the same time, the City is and must remain committed to preserving the health, safety and well-being of its residents.

By this Act, the voters find and declare that post employment benefits must be adjusted in a manner that protects the City's viability and public safety, at the same time allowing for the continuation of fair post-employment benefits for its workers.

The Charter currently provides that the City retains the authority to amend or otherwise change any of its retirement plans, subject to other provisions of the Charter.

This Act is intended to strengthen the finances of the City to ensure the City's sustained ability to fund a reasonable level of benefits as contemplated at the time of the voters' initial adoption of the City's retirement programs. It is further designed to ensure that future retirement benefit increases be approved by the voters.

Section 1502-A: INTENT

This Act is intended to ensure the City can provide reasonable and sustainable post employment benefits while at the same time delivering Essential City Services to the residents of San Jose.

The City reaffirms its plenary authority as a charter city to control and manage all compensation provided to its employees as a municipal affair under the California Constitution.

The City reaffirms its inherent right to act responsibly to preserve the health, welfare and well-being of its residents.

This Act is not intended to deprive any current or former employees of benefits earned and accrued for prior service as of the time of the Act's effective date; rather, the Act is intended to preserve earned benefits as of the effective date of the Act.

This Act is not intended to reduce the pension amounts received by any retiree or to take away any cost of living increases paid to retirees as of the effective date of the Act.

The City expressly retains its authority existing as of January 1, 2012, to amend, change or terminate any retirement or other post employment benefit program provided by the City pursuant to Charter Sections 1500 and 1503.

Section 1503-A. Act Supersedes All Conflicting Provisions

The provisions of this Act shall prevail over all other conflicting or inconsistent wage, pension or post employment benefit provisions in the Charter, ordinances, resolutions or other enactments.

The City Council shall adopt ordinances as appropriate to implement and effectuate the provisions of this Act. The goal is that such ordinances shall become effective no later than September 30, 2012.

Section 1504-A. Reservation of Voter Authority

The voters expressly reserve the right to consider any change in matters related to pension and other post employment benefits. Neither the City Council, nor any arbitrator appointed pursuant to Charter Section 1111, shall have authority to agree to or provide any increase in pension and/or retiree healthcare benefits without voter approval, except that the Council shall have the authority to adopt Tier 2 pension benefit plans within the limits set forth herein.

Section 1505-A. Reservation of Rights to City Council

Subject to the limitations set forth in this Act, the City Council retains its authority to take all actions necessary to effectuate the terms of this Act, to make any and all changes to retirement plans necessary to ensure the preservation of the tax status of the plans, and at any time, or from time to time, to amend or otherwise change any retirement plan or plans or establish new or different plan or plans for all or any officers or employees subject to the terms of this Act.

Section 1506-A. Current Employees

(a) "Current Employees" means employees of the City of San Jose as of the effective date of this Act and who are not covered under the Tier 2 Plan (Section 8).

(b) Unless they voluntarily opt in to the Voluntary Election Program ("VEP," described herein), Current Employees shall have their compensation adjusted through additional retirement contributions in increments of 4% of pensionable pay per year, up to a maximum of 16%, but no more than 50% of the costs to

amortize any pension unfunded liabilities, except for any pension unfunded liabilities that may exist due to Tier 2 benefits in the future. These contributions shall be in addition to employees' normal pension contributions and contributions towards retiree healthcare benefits.

(c) The starting date for an employee's compensation adjustment under this Section shall be June 23, 2013, regardless of whether the VEP has been implemented. If the VEP has not been implemented for any reason, the compensation adjustments shall apply to all Current Employees.

(d) The compensation adjustment through additional employee contributions for Current Employees shall be calculated separately for employees in the Police and Fire Department Retirement Plan and employees in the Federated City Employees' Retirement System.

(e) The compensation adjustment shall be treated in the same manner as any other employee contributions. Accordingly, the voters intend these additional payments to be made on a pre-tax basis through payroll deductions pursuant to applicable Internal Revenue Code Sections. The additional contributions shall be subject to withdrawal, return and redeposit in the same manner as any other employee contributions.

Section 1507-A: One Time Voluntary Election Program ("VEP")

The City Council shall adopt a Voluntary Election Program ("VEP") for all Current Employees who are members of the existing retirement plans of the City as of the effective date of this Act. The implementation of the VEP is contingent upon receipt of

IRS approval. The VEP shall permit Current Employees a one time limited period to enroll in an alternative retirement program which, as described herein, shall preserve an employee's earned benefit accrual; the change in benefit accrual will apply only to the employee's future City service. Employees who opt into the VEP will be required to sign an irrevocable election waiver (as well as their spouse or domestic partner, former spouse or former domestic partner, if legally required) acknowledging that the employee irrevocably relinquishes his or her existing level of retirement benefits and has voluntarily chosen reduced benefits, as specified below.

The VEP shall have the following features and limitations:

(a) The plan shall not deprive any Current Employee who chooses to enroll in the VEP of the accrual rate (e.g. 2.5%) earned and accrued for service prior to the VEP's effective date; thus, the benefit accrual rate earned and accrued by individual employees for that prior service shall be preserved for payment at the time of retirement.

(b) Pension benefits under the VEP shall be based on the following limitations:

(i) The accrual rate shall be 2.0% of "final compensation", hereinafter defined, per year of service for future years of service only.

(ii) The maximum benefit shall remain the same as the maximum benefit for Current Employees.

(iii) The current age of eligibility for service retirement under the existing plan as approved by the City

Council as of the effective date of the Act for all years of service shall increase by six months annually on July 1 of each year until the retirement age reaches the age of 57 for employees in the Police and Fire Department Retirement Plan and the age of 62 for employees in the Federated City Employees' Retirement System. Earlier retirement shall be permitted with reduced payments that do not exceed the actuarial value of full retirement. For service retirement, an employee may not retire any earlier than the age of 55 in the Federated City Employees' Retirement System and the age of 50 in the Police and Fire Department Retirement Plan.

(iv) The eligibility to retire at thirty (30) years of service regardless of age shall increase by 6 months annually on July 1 of each year starting July 1, 2017.

(v) Cost of living adjustments shall be limited to the increase in the consumer price index, (San Jose – San Francisco – Oakland U.S. Bureau of Labor Statistics index, CPI-U, December to December), capped at 1.5% per fiscal year. The first COLA adjustment following the effective date of the Act will be prorated based on the number of remaining months in the year after retirement of the employee.

(vi) "Final compensation" shall mean the average annual pensionable pay of the highest three consecutive years of service.

(vii) An employee will be eligible for a full year of service credit upon reaching 2080 hours of regular time

worked (including paid leave, but not including overtime).

(c) The cost sharing for the VEP for current service or current service benefits ("Normal Cost") shall not exceed the ratio of 3 for employees and 8 for the City, as presently set forth in the Charter. Employees who opt into the VEP will not be responsible for the payment of any pension unfunded liabilities of the system or plan.

(d) VEP Survivorship Benefits.

(i) Survivorship benefits for a death before retirement shall remain the same as the survivorship benefits for Current Employees in each plan.

(ii) Survivorship benefits for a spouse or domestic partner and/or child(ren) designated at the time of retirement for death after retirement shall be 50% of the pension benefit that the retiree was receiving. At the time of retirement, retirees can at their own cost elect additional survivorship benefits by taking an actuarially equivalent reduced benefit.

(e) VEP Disability Retirement Benefits.

(i) A service connected disability retirement benefit, as hereinafter defined, shall be as follows:

The employee or former employee shall receive an annual benefit based on 50% of the average annual pensionable pay of the highest three consecutive years of service.

(ii) A non-service connected disability retirement benefit shall be as follows:

The employee or former employee shall receive 2.0% times years of City Service (minimum 20% and maximum of 50%) based on the average annual pensionable pay of the highest three consecutive years of service. Employees shall not be eligible for a non-service connected disability retirement unless they have 5 years of service with the City.

(iii) Cost of Living Adjustment ("COLA") provisions will be the same as for the service retirement benefit in the VEP.

Section 1508-A: Future Employees – Limitation on Retirement Benefits – Tier 2

To the extent not already enacted, the City shall adopt a retirement program for employees hired on or after the ordinance enacting Tier 2 is adopted. This retirement program – for new employees – shall be referred to as "Tier 2."

The Tier 2 program shall be limited as follows:

(a) The program may be designed as a "hybrid plan" consisting of a combination of Social Security, a defined benefit plan and/or a defined contribution plan. If the City provides a defined benefit plan, the City's cost of such plan shall not exceed 50% of the total cost of the Tier 2 defined benefit plan (both normal cost and unfunded liabilities). The City may contribute to a defined contribution or other retirement plan only when and to the extent

the total City contribution does not exceed 9%. If the City's share of a Tier 2 defined benefit plan is less than 9%, the City may, but shall not be required to, contribute the difference to a defined contribution plan.

(b) For any defined benefit plan, the age of eligibility for payment of accrued service retirement benefits shall be 65, except for sworn police officers and firefighters, whose service retirement age shall be 60. Earlier retirement may be permitted with reduced payments that do not exceed the actuarial value of full retirement. For service retirement, an employee may not retire any earlier than the age of 55 in the Federated City Employees' Retirement System and the age of 50 in the Police and Fire Department Retirement Plan.

(c) For any defined benefit plan, cost of living adjustments shall be limited to the increase in the consumer price index (San Jose – San Francisco – Oakland U.S. Bureau of Labor Statistics index, CPI-U, December to December), capped at 1.5% per fiscal year. The first COLA adjustment will be prorated based on the number of months retired.

(d) For any defined benefit plan, "final compensation" shall mean the average annual earned pay of the highest three consecutive years of service. Final compensation shall be base pay only, excluding premium pays or other additional compensation.

(e) For any defined benefit plan, benefits shall accrue at a rate not to exceed 2% per year of service, not to exceed 65% of final compensation.

(f) For any defined benefit plan, an employee will be eligible for a full year of service credit upon reaching 2080 hours of regular time worked (including paid leave, but not including overtime).

(g) Employees who leave or have left City service and are subsequently rehired or reinstated shall be placed into the second tier of benefits (Tier 2). Employees who have at least five (5) years of service credit in the Federated City Employees' Retirement System or at least ten (10) years of service credit in the Police and Fire Department Retirement Plan on the date of separation and who have not obtained a return of contributions will have their benefit accrual rate preserved for the years of service prior to their leaving City service.

(h) Any plan adopted by the City Council is subject to termination or amendment in the Council's discretion. No plan subject to this section shall create a vested right to any benefit.

Section 1509-A: Disability Retirements

(a) To receive any disability retirement benefit under any pension plan, City employees must be incapable of engaging in any gainful employment for the City, but not yet eligible to retire (in terms of age and years of service). The determination of qualification for a disability retirement shall be made regardless of whether there are other positions available at the time a determination is made.

(b) An employee is considered "disabled" for purposes of qualifying for a disability retirement, if all of the following is met:

(i) An employee cannot do work that they did before; and

(ii) It is determined that

1) an employee in the Federated City Employees' Retirement System cannot perform any other jobs described in the City's classification plan because of his or her medical condition(s); or

2) an employee in the Police and Fire Department Retirement Plan cannot perform any other jobs described in the City's classification plan in the employee's department because of his or her medical condition(s); and

(iii) The employee's disability has lasted or is expected to last for at least one year or to result in death.

(c) Determinations of disability shall be made by an independent panel of medical experts, appointed by the City Council. The independent panel shall serve to make disability determinations for both plans. Employees and the City shall have a right of appeal to an administrative law judge.

(d) The City may provide matching funds to obtain long term disability insurance for employees who do not qualify for a disability retirement but incur long term reductions in compensation as the result of work related injuries.

(e) The City shall not pay workers' compensation benefits for disability on top of disability retirement benefits without an offset to the service connected disability retirement allowance to eliminate duplication of benefits for the same cause of disability, consistent with the current provisions in the Federated City Employees' Retirement System.

Section 1510-A: Emergency Measures to Contain Retiree Cost of Living Adjustments

If the City Council adopts a resolution declaring a fiscal and service level emergency, with a finding that it is necessary to suspend increases in cost of living payments to retirees the City may adopt the following emergency measures, applicable to retirees (current and future retirees employed as of the effective date of this Act):

(a) Cost of living adjustments ("COLAs") shall be temporarily suspended for all retirees in whole or in part for up to five years. The City Council shall restore COLAs prospectively (in whole or in part), if it determines that the fiscal emergency has eased sufficiently to permit the City to provide essential services protecting the health and well-being of City residents while paying the cost of such COLAs.

(b) In the event the City Council restores all or part of the COLA, it shall not exceed 3% for Current Retirees and Current Employees who did not opt into the VEP and 1.5% for Current Employees who opted into the VEP and 1.5% for employees in Tier 2.

Section 1511-A: Supplemental Payments to Retirees

The Supplemental Retiree Benefit Reserve ("SRBR") shall be discontinued, and the assets returned to the appropriate retirement trust fund. Any supplemental payments to retirees in addition to the benefits authorized herein shall not be funded from plan assets.

Section 1512-A: Retiree Healthcare

(a) **Minimum Contributions.** Existing and new employees must contribute a minimum of 50% of the cost of retiree healthcare, including both normal cost and unfunded liabilities.

(b) **Reservation of Rights.** No retiree healthcare plan or benefit shall grant any vested right, as the City retains its power to amend, change or terminate any plan provision.

(c) **Low Cost Plan.** For purposes of retiree healthcare benefits, "low cost plan" shall be defined as the medical plan which has the lowest monthly premium available to any active employee in either the Police and Fire Department Retirement Plan or Federated City Employees' Retirement System.

Section 1513-A: Actuarial Soundness (for both pension and retiree healthcare plans)

(a) All plans adopted pursuant to the Act shall be subject to an actuarial analysis publicly disclosed before adoption by the City Council, and pursuant to an independent valuation using standards set by the Government Accounting Standards Board and the Actuarial Standards Board, as may be amended from time to time. All plans adopted pursuant to the Act shall: (i) be actuarially sound; (ii) minimize any risk to the City and its residents; and (iii) be prudent and reasonable in light of the economic climate. The employees covered under the plans must share in the investment, mortality, and other risks and expenses of the plans.

(b) All of the City's pension and retiree healthcare plans must be actuarially sound, with unfunded liabilities determined annually

through an independent audit using standards set by the Government Accounting Standards Board and the Actuarial Standards Board. No benefit or expense may be paid from the plans without being actuarially funded and explicitly recognized in determining the annual City and employee contributions into the plans.

(c) In setting the actuarial assumptions for the plans, valuing the liabilities of the plans, and determining the contributions required to fund the plans, the objectives of the City's retirement boards shall be to:

(i) achieve and maintain full funding of the plans using at least a median economic planning scenario. The likelihood of favorable plan experience should be greater than the likelihood of unfavorable plan experience; and

(ii) ensure fair and equitable treatment for current and future plan members and taxpayers with respect to the costs of the plans, and minimize any intergenerational transfer of costs.

(d) When investing the assets of the plans, the objective of the City's retirement boards shall be to maximize the rate of return without undue risk of loss while having proper regard to:

(i) the funding objectives and actuarial assumptions of the plans; and

(ii) the need to minimize the volatility of the plans' surplus or deficit and, by extension, the impact on the volatility of contributions required to be made by the City or employees.

Section 1514-A: Savings

In the event Section 6 (b) is determined to be illegal, invalid or unenforceable as to Current Employees (using the definition in Section 6(a)), then, to the maximum extent permitted by law, an equivalent amount of savings shall be obtained through pay reductions. Any pay reductions implemented pursuant to this section shall not exceed 4% of compensation each year, capped at a maximum of 16% of pay.

Section 1515-A: Severability

(a) This Act shall be interpreted so as to be consistent with all federal and state laws, rules and regulations. The provisions of this Act are severable. If any section, sub-section, sentence or clause ("portion") of this Act is held to be invalid or unconstitutional by a final judgment of a court, such decision shall not affect the validity of the remaining portions of this amendment. The voters hereby declare that this Act, and each portion, would have been adopted irrespective of whether any one or more portions of the Act are found invalid. If any portion of this Act is held invalid as applied to any person or circumstance, such invalidity shall not affect any application of this Act which can be given effect. In particular, if any portion of this Act is held invalid as to Current Retirees, this shall not affect the application to Current Employees. If any portion of this Act is held invalid as to Current Employees, this shall not affect the application to New Employees. This Act shall be broadly construed to achieve its stated purposes. It is the intent of the voters that the provisions of this Act be interpreted or implemented by the City, courts and others in a manner that facilitates the purposes set forth herein.

(b) If any ordinance adopted pursuant to the Act is held to be invalid, unconstitutional or otherwise unenforceable by a final judgment, the matter shall be referred to the City Council for determination as to whether to amend the ordinance consistent with the judgment, or whether to determine the section severable and ineffective.

ADOPTED this 6th day of March, 2012, by the following vote:

AYES:	CONSTANT, HERRERA, LICCARDO, NGUYEN, OLIVERIO, PYLE, ROCHA; REED.
NOES:	CAMPOS, CHU, KALRA.
ABSENT:	NONE.
DISQUALIFIED:	NONE.

CHUCK REED
Mayor

ATTEST:

DENNIS D. HAWKINS, CMC
City Clerk

EXHIBIT B

Gregg McLean Adam, No. 203436
Jonathan Yank, No. 215495
Jennifer S. Stoughton, No. 238309
CARROLL, BURDICK & McDONOUGH LLP
Attorneys at Law
44 Montgomery Street, Suite 400
San Francisco, CA 94104
Telephone: 415.989.5900
Facsimile: 415.989.0932
Email: gadam@cbmlaw.com
jyank@cbmlaw.com
jstoughton@cbmlaw.com

Attorneys for Proposed Relator
San Jose Police Officers' Association

BEFORE THE ATTORNEY GENERAL

OF THE STATE OF CALIFORNIA

SAN JOSE POLICE OFFICERS' ASSOCIATION, Plaintiff-Relator, v. CITY OF SAN JOSE, and CITY OF SAN JOSE CITY COUNCIL, Defendants.	No. **NOTICE OF APPLICATION FOR LEAVE TO SUE IN QUO WARRANTO**

NOTICE IS HEREBY GIVEN that San Jose Police Officers' Association, the Proposed Relator, is applying to the Attorney General of the State of California for leave to sue in quo warranto.

Pursuant to Title XI, sections 1 and 2, of the California Code of Regulations, the following documents are enclosed:

1. a copy of Relator's Application for Leave to Sue in Quo Warranto;
2. a copy of the [Proposed] Verified Complaint;
3. a copy of the Verified Statement of Facts in Support of the Application; and

4. a Memorandum of Points and Authorities in Support of this Application.

FURTHER NOTICE IS HEREBY GIVEN that you have fifteen (15) days after service of this Notice to appear before the Attorney General and to show cause, if you have any, why leave to sue should not be granted in accordance with the Relator's Application.

Dated: June 21, 2012

CARROLL, BURDICK & McDONOUGH LLP

By _____
Gregg McLean Adam
Jonathan Yank
Jennifer Stoughton
Attorneys for Proposed Relator
San Jose Police Officers' Association

EXHIBIT C

Gregg McLean Adam, No. 203436
Jonathan Yank, No. 215495
Jennifer S. Stoughton, No. 238309
CARROLL, BURDICK & McDONOUGH LLP
Attorneys at Law
44 Montgomery Street, Suite 400
San Francisco, CA 94104
Telephone: 415.989.5900
Facsimile: 415.989.0932
Email: gadam@cbmlaw.com
jyank@cbmlaw.com
jstoughton@cbmlaw.com

Attorneys for Proposed Relator
San Jose Police Officers' Association

BEFORE THE ATTORNEY GENERAL

OF THE STATE OF CALIFORNIA

SAN JOSE POLICE OFFICERS' ASSOCIATION, Plaintiff-Relator, v. CITY OF SAN JOSE, and CITY OF SAN JOSE CITY COUNCIL, Defendants.	No. **APPLICATION FOR LEAVE TO SUE IN QUO WARRANTO**

TO THE ATTORNEY GENERAL OF THE STATE OF CALIFORNIA:

In accordance with Section 803 of the Code of Civil Procedure, application is hereby made by Proposed Relator San Jose Police Officers' Association, for leave to sue in quo warranto, in the name of the People of the State of California.

Pursuant to Title XI, section 2, of the California Code of Regulations, the following documents are enclosed:

1. an original and one copy of the [Proposed] Verified Complaint prepared for the signature of the Attorney General, a Deputy Attorney General, and the attorney for the Relator;
2. a Verified Statement of Facts in Support of this Application;

3. a Memorandum of Points and Authorities in Support of this Application;

4. a copy of a Notice directed to the proposed Defendant, advising them of this Application and giving them fifteen (15) days to appear and to show cause why leave to sue should not be granted; and

5. Proof of Service of the foregoing documents on the proposed Defendant—to be added after service on proposed defendants.

Dated: June 21, 2012

CARROLL, BURDICK & McDONOUGH LLP

By _____
Gregg McLean Adam
Jonathan Yank
Jennifer Stoughton
Attorneys for Proposed Relator
San Jose Police Officers' Association

EXHIBIT D

Gregg McLean Adam, No. 203436
Jonathan Yank, No. 215495
Jennifer S. Stoughton, No. 238309
CARROLL, BURDICK & McDONOUGH LLP
Attorneys at Law
44 Montgomery Street, Suite 400
San Francisco, CA 94104
Telephone: 415.989.5900
Facsimile: 415.989.0932
Email: gadam@cbmlaw.com
jyank@cbmlaw.com
jstoughton@cbmlaw.com

Attorneys for Plaintiff
San Jose Police Officers' Association

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SANTA CLARA

THE PEOPLE OF THE STATE OF CALIFORNIA on the RELATION of SAN JOSE POLICE OFFICERS' ASSOCIATION,

Plaintiff,

v.

CITY OF SAN JOSE, and CITY COUNCIL OF SAN JOSE,

Defendants.

No.

VERIFIED COMPLAINT IN *QUO WARRANTO*

[CODE CIV. PROC. § 803; CAL. CODE REG TITLE 11, SECTION 2(A)]

The People of the State of California, on the Relation of SAN JOSE POLICE OFFICERS' ASSOCIATION complain of Defendants, and for cause of action allege as follows:

1. This action is brought pursuant to Section 803 of the Code of Civil Procedure.

2. At all times herein mentioned, Defendant the CITY OF SAN JOSE ("the City"), was a municipal corporation existing, qualifying, and acting under a charter granted by the Legislature of the State of California and adopted pursuant to the Constitution of the laws of the State of California.

3. At all times herein mentioned, Defendant the CITY COUNCIL OF SAN JOSE ("City Council") was a municipal corporation existing, qualifying, and acting under a charter granted by the Legislature of the State of California and adopted pursuant to the Constitution of the laws of the State of California.

4. The relator in this action is the SAN JOSE POLICE OFFICERS' ASSOCIATION ("SJPOA", "Plaintiff" or "Relator").

The Parties and Their Collective Bargaining Relationship Under the Meyers-Milias-Brown Act, Government Code Section 3500 *et seq.*

5. Labor-management relations and the process of bargaining between the SJPOA and the City are governed by the Meyers-Milias-Brown Act ("the MMBA" or "the Act"), Government Code section 3500, *et seq.*

6. The SJPOA is, and was at all relevant times, a non-profit corporation organized and existing under the laws of the State of California, with its principal place of business in the County of Santa Clara. The SJPOA is the "recognized employee organization" for all police officer classifications in Bargaining Units 11, 12, 13 and 14 (collectively "Police Officers") employed by the City of San Jose to work in the San Jose Police Department, pursuant to the Meyers-Milias-Brown Act, Government Code section 3500 *et. seq.* ("MMBA"). As one of its functions, the relator represents public employees on matters related to their employment conditions, including wages and hours. Plaintiff's

approximately 1100 members perform all law enforcement functions for the nearly 1 million residents of the City of San Jose.

7. By reason of the facts stated in the prior paragraph, the SJPOA is beneficially interested in the City's faithful performance of its obligations under the MMBA. The SJPOA brings this action on behalf of itself and its members, having standing to do so under the doctrine articulated by the California Supreme Court in *Professional Fire Fighters v. City of Los Angeles* (1963) 60 Cal.2d 276, and *Int'l Assoc. of Fire Fighters v. City of Palo Alto* (1963) 60 Cal.2d 295.

8. At all times relevant, the City is and has been the employer of the SJPOA's members and a "public agency" within the meaning of the MMBA. As a charter city, in addition to being bound by the MMBA in regard to its labor-relations with the SJPOA, the City is governed by the San Jose City Charter.

9. The MMBA requires that the City meet and confer in good faith with the SJPOA over the wages, hours, and other terms and conditions of employment for Police Officers, including retirement benefits. (Gov. Code §§ 3504, 3505.) When negotiations result in agreement between the parties, the MMBA requires that the agreement be reduced to a mutually-signed writing known as a "memorandum of agreement" ("MOA"). (Gov. Code § 3505.1.)

10. The MMBA further states that "knowingly providing a recognized employee organization with inaccurate information regarding the financial resources of the public employer, whether or not in response to a request for information, constitutes a refusal or failure to meet and negotiate in good faith." (Gov. Code § 3506.5(c).)

11. The MMBA also prohibits the City from taking unilateral action on matters impacting wages, hours, and other terms and conditions of employment for Police Officers without first providing the SJPOA with reasonable notice and an opportunity to bargain, resolve any differences, and reach agreement prior to implementation. (Gov. Code § 3504.5.) "The duty to bargain requires the public agency to refrain from making unilateral changes in employees' wages and working conditions until the employer and

employee association have bargained to impasse." (*Santa Clara County Counsel Attorneys Assoc. v. Woodside* (1994) 7 Cal.4th 525, 537.) Thus, for example, it is well-established that an MMBA-covered city is "required to meet and confer with [a union representing impacted employees] before it propose[s] charter amendments which affect matters within their scope of representation." (*People ex rel. Seal Beach Police Officers Assn. v. City of Seal Beach* ("*Seal Beach*") (1984) 36 Cal.3d 591, 602.)

12. Where there is no imminent need to act prior to a deadline to place a proposed measure on an election ballot, doing so without first satisfying the bargaining obligation violates Government Code section 3504. (*Santa Clara County Registered Nurses Assoc.* (2010) PERB Decision No. 2120-M, pp. 15-16.)[1] In order to demonstrate that financial difficulties create a compelling operational necessity permitting unilateral action prior to satisfying the bargaining obligation, the employer must demonstrate "an actual financial emergency which leaves no real alternative to the action taken and allows no time for meaningful negotiations before taking action." (*Id.* at p.16.) "The mere fact that [a public employer] thought the inclusion of the measure on the ... ballot was desirable does not constitute a compelling operational necessity sufficient to set aside its bargaining obligation." (*Id.* at 17.)

13. Even after bargaining has reached a state of impasse, the bargaining obligation does not end permanently. Rather, "impasse is always viewed as a temporary circumstance and the impasse doctrine ... therefore, is not a device to allow any party to continue to act unilaterally or to engage in the disparagement of the collective bargaining process." (*McClatchy Newspaper* (1996) 321 NLRB 1386, 1398-1390.) "An impasse does not constitute a license to avoid the statutory obligation to bargain collectively where the circumstances which led to the impasse no longer remain in status quo." (*Kit*

[1] The Public Employment Relations Board ("PERB") is the California administrative agency generally charged with construing and administering the MMBA. (Gov. Code §§ 3501 and 3509.) While PERB does not have jurisdiction over cases involving labor associations representing police officers (Gov. Code § 3511), Courts give great deference to its construction of the MMBA. (*Banning Teachers Assn. v. Public Employment Relations Bd.* (1988) 44 Cal.3d 799, 804–805.)

Manufacturing Co., Inc. and Sheet Metal Workers Int'l Assoc., Local 213, AFL-CIO (1962) 138 NLRB 1290, 1294.) Thus, "[a]nything that creates a new possibility of fruitful discussion (even if it does not create a likelihood of agreement) breaks an impasse." (*Gulf States Mfg. Inc. v. N.L.R.B.* (5th Cir. 1983) 704 F.2d 1390, 1399 [citations omitted].)[2] Thus, when a party has made a significant bargaining concession, impasse will be broken. Likewise, when an employer's financial condition has improved substantially, impasse will be broken. (*See, e.g., Kit Manufacturing Co., Inc. and Sheet Metal Workers Int'l Assoc., Local 213, AFL-CIO* (1962) 138 NLRB 1290, 1294-1295.)

14. On or about March 6, 2012, the defendants submitted to the electorate of the City of San Jose a ballot measure designed to dramatically reduces the pension benefits of SJPOA-represented Police Officers by forcing current employees into a new retirement plan that, *inter alia*, severely reduces accrual rates, dramatically increases minimum retirement age and service requirements, cuts the maximum cost-of-living adjustment in half (from 3% to 1.5%), and slashes survivorship and disability retirement benefits.

15. On or about June 5, 2012, a majority of the electorate approved the foregoing resolution. The charter amendment thus approved was thereafter filed with the Secretary of State.

16. The proceedings described in Paragraphs 14 and 15, which were taken by the defendants to amend its charter, were defective and violative of Government Code § 3500 *et seq.* in that defendants (1) failed to meet and confer in good faith with the SJPOA to discuss the proposed cuts to the benefits prior to arriving at the ballot measure and engaged in bad-faith bargaining by, *inter alia*, insisting that the SJPOA was required to convince the City to undo its *fait accompli* and asserting that the City was under no

---

[2] Decisions by the federal courts and the National Labor Relations Board ("NLRB") construing the Labor Management Relations Act are persuasive in construing similar California labor relations statutes. (*See, e.g., Modesto City*, 136 Cal.App.3d at 895-896; *J. R. Norton Co. v. ALRB* (1987) 192 Cal.App.3d 874, 908.) Decisions interpreting similar provisions of other California labor statutes are also persuasive. *County Sanitation Dist. No. 2 v. Los Angeles County Employees' Assn.* (1985) 38 Cal.3d 564, 572-573.

obligation to bargain with the SJPOA in any event, (2) deliberately overstated the extent of its pension liabilities—by in excess of $250 million dollars—to create enormous public and media pressure on the SJPOA to make concessions and inhibit the parties' ability to reach agreement (which is a per se unfair labor practice pursuant to Government Code section 3506.5) and (3) failed and refused to return to bargaining on the asserted basis that the parties were at impasse even after significantly changed circumstances required a resumption of bargaining, including an improved financial outlook for the City, greatly improved pension fund performance, and significant monetary concessions by the SJPOA. These allegations are set forth in further detail below.

The Defendants Violated the Meyers-Milias-Brown Act, Government Code Section 3500 *et seq.*, by Deciding to Place Measure B Before the Voters Without First Providing the SJPOA With Notice and an Opportunity to Bargain

17. In the spring and early summer of 2011, during collective bargaining negotiations, SJPOA and the City had lengthy negotiations over retirement benefits. The parties agreed to create a program through which current employees could voluntarily choose to opt out of the current level of pension benefits into a lower level of benefits ("the SJPOA opt-in").

18. The parties also agreed that either side could continue to "meet and confer" (the technical term for collective bargaining and used herein interchangeably with the term "bargaining") on pension and retiree health care benefits for current and future employees, notwithstanding that they had reached an agreement on other terms and conditions of employment.

19. Notwithstanding this agreement, and almost before the ink on it was dry, the City's Mayor, Chuck Reed, began a campaign to have the City Council declare a fiscal emergency.

20. Concurrently, the Mayor and other City Council members proposed a ballot measure that would unilaterally reduce retirement benefits of all city employees, including those represented by SJPOA. On May 13, 2011, the City published a Memorandum re: Fiscal Concerns wherein Mayor Chuck Reed asserted that the City's

pension costs were projected to grow to $650 million annually by 2016 and recommended that the City Council approve a ballot measure to amend the San Jose City Charter to dramatically decrease retirement benefits for current retires and current/future employees, as well as to require voter approval of future increases in retirement benefits for these same employees. The Mayor recommended setting a maximum level of retirement benefits (that, in some cases, were less than current employees and retirees earn currently) that could not be exceeded without voter approval.

21. At a meeting on May 24, 2011, the City Council approved the Mayor's recommendation and directed City Council staff to draft a proposed ballot measure that, if approved by the voters of the City of San Jose, would implement the Mayor's recommendations.

22. The Mayor began a frenzied political and media campaign warning of impending fiscal disaster for the City as a result of projections for escalating pension costs. The Mayor and his staff repeatedly asserted, including in official city documents put forward as part of the City's bargaining position, that by Fiscal Year 2015-16, the City's retirement contribution could reach $650 million per year, from a 2010-11 level of $245 million in Fiscal Year 2010-2011. This figure was used approximately 38 times, including in press releases and interviews in the New York Times and Vanity Fair magazine.

23. Throughout these discussions, the City continued to represent that its pension costs were projected to increase annually to approximately $650 million by 2016. As detailed below, these representations were knowingly false and without basis.

24. As recently as February 24, 2012, the Mayor asserted that the City's pension liability could still reach $650 million by 2015-16.

25. In response to the City's ballot measure, SJPOA and other San Jose labor unions invoked their statutory and City Charter rights to meet and confer about the ballot measure. Concurrently, SJPOA, in coalition with IAFF, Local 230 ("Local 230"),

representing firefighters employed by the City of San Jose, bargained over retirement benefits and the SJPOA opt-in.

26. In mid-July, the SJPOA and the City began bargaining over retirement benefits. The negotiations concerned retirement benefits, the ballot measure and SJPOA's opt-in.

27. Throughout the meet and confer process, the City's position was that it would vote on sending the ballot measure to the public at a Special Election, planned for March 2012.

28. The original ground rules contemplated that the parties would complete bargaining on the July 5, 2011 ballot measure by October 31, 2011. Thereafter, if no agreement had been reached, the parties would enter mediation.

29. The negotiations were made more difficult by the City's own acknowledgement that the changes to retirement benefits being proposed by the ballot measure were of questionable legal validity.

30. Despite the difficulty, over the following four (4) months, the parties met and conferred at least 13 times, including on July 13, August 2, 25, 30, and 21, September 13, 15, and 27, and October 5, 12, 14, 17, and 20. During the Retirement Negotiations, the parties bargained over various proposals put forth by the SJPOA and the City regarding retirement generally, along with bargaining about the specific language of the proposed ballot measure. In the course of the negotiations, the City passed proposals on the following subjects unrelated to the ballot measure: Retirement benefits for New Employees; Retiree Healthcare Benefits For New Employees; Supplemental Retiree Benefit Reserve ("SRBR"); Healthcare Cost Sharing; and Workers' Compensation Offset. For example, the City proposed to change the retirement benefits for new employees, such that the pension benefits formula for employees hired after April 1, 2012 would be 1.5% per year of service, subject to a maximum of 60% of final compensation, and raising the retirement year to 60 years old. The City also proposed to cap any cost of living

adjustments to 1% per fiscal year and to limit the City's maximum contribution to 9% of pensionable compensation.

31. The SJPOA, in conjunction with the other labor unions, also made various proposals in the course of bargaining unrelated to the ballot measure. For example, on September 26, 2011, they proposed a three-tier retirement model that maintained the *status quo* for active employees but created a second tier for new hires and opt-ins with reduced retirement benefits.

32. The parties met and conferred until approximately October 31, 2011, but unfortunately were unable to reach an agreement. On November 15-16, 2011, the parties participated in mediation in an effort to resolve their differences. The mediation was not successful.

33. Following mediation, in the run up to the Council's planned vote, the City significantly changed its ballot proposal on November 22, 2011. In an email to all employees, the City Manager Debra Figone described the revised ballot measure as "far different than the earlier versions."

34. On November 11, November 18 and December 1, 2011, SJPOA and Local 230 (described herein collectively as "the Unions") put forward new proposals significantly amending their prior proposal. The Unions asked to resume bargaining over the revised ballot measure and the Unions' revised proposals. But the City refused to bargain, or deviate from its original plan to vote on its proposed ballot measure on December 6.

35. No bargaining has taken place at any time over the City's revised November 22, 2011 ballot measure or the Unions' proposals of November 11, November 18 and December 1, 2011.

36. On December 1, 2011, the independent actuary for the Retirement Plan issued an updated report with projections for prospective City retirement contributions. The report showed that the City's retirement contributions would be far less than previously estimated and far less than the City had been relying on as justification for both

its proposed Declaration of a Fiscal Emergency and its ballot measure. The report showed that—just for the Police and Fire Retirement Plan—the City's contributions for Fiscal Year 2012-13 would be approximately $55 million *less than* previously expected.

37. On approximately December 5, 2011, the Mayor withdrew his proposal to have the City Council declare a Fiscal State of Emergency.

38. But notwithstanding the Unions' new proposals or the greatly reduced pension contribution projections, the City Council voted to place the November 22, 2012 ballot measure before the voters.

39. On December 6, 2011, the City Council adopted Resolution 76087 and approved a ballot measure for the June 2012 election ballot, which, *inter alia*, would implement dramatic reductions in Police Officers' retirement benefits beginning June 24, 2012. The draft ballot measure language approved by the City Council was prepared on December 5, 2011, and though largely based on the November 22 version, was approved by the Council the following day, without providing the SJPOA with notice and an opportunity to bargain, as required by the MMBA. (Gov. Code § 3504.5 [requiring notice and opportunity to bargain before adoption of "ordinance, rule, resolution, or regulation directly relating to matters within the scope of representation proposed to be adopted by the governing body"]; *Seal Beach, supra,* 36 Cal.3d at 602.)

40. The ballot measure language approved by the City Council on December 6, 2011, dramatically reduces the pension benefits of SJPOA-represented Police Officers by forcing current employees into a new retirement plan that, *inter alia*, severely reduces accrual rates, dramatically increases minimum retirement age and service requirements, cuts the maximum cost-of-living adjustment in half (from 3% to 1.5%), and slashes survivorship and disability retirement benefits. Police Officers who elect not to go into the misnomered "Voluntary Election Program," would be punished by slashing their salaries and requiring that they pay 50% of existing unfunded liabilities.

41. The City took the unusual step, however, of seeking to put the ballot measure before the voters in June of 2012, not March 2012, as previously planned. The

City Council then essentially directed City staff to engage in after-the-fact mediation—but not bargaining—with the SJPOA and other City unions.

42. The SJPOA subsequently met with the City on two occasions in late December, 2011 and early January 2012, but the City refused to agree to bargain, taking the position that the parties remained at impasse.

43. On February 21, 2012, the City, through its Director of Labor Relations, provided the SJPOA with a copy of a revised version of its ballot measure and informed the SJPOA that the City Council intended to take a final vote on language for a June 2012 ballot measure at its regularly-calendared session on March 6, 2012. *Inter alia*, the measure language was amended to move its effective date to June 23, 2013.

44. On February 24, 2012, the SJPOA made a request to bargain about the February 21, 2012 ballot measure. The letter noted that the February 21, 2012 revised measure contained significant changes from the December 6, 2011 version and specifically referenced a concession by the City Manager that it contained "many significant changes and movement from earlier drafts." The SJPOA noted that it "had no opportunity to bargain about this new ballot language."

45. On February 27, 2012, the City's Labor Relations Director, Alex Gurza responded to the SJPOA's February 24 communication by conditioning any resumption of bargaining on the Association (1) making a concession that the City deemed in its subjective opinion to be "sufficient" and (2) that such concession be capable of being "ratified prior to March 6."

46. On March 2, 2012, SJPOA and Local 230 presented a new proposal—designed to meet the City's concern about the un-guaranteed nature of prior union proposals—which guaranteed tens of millions of dollars in savings to the City annually.

47. The City rejected the proposal on March 5, 2012—*i.e.*, within 72 hours—without any meeting or bargaining about the proposal.

48. On March 6, 2012, the San Jose City Council adopted a resolution to place the February 21, 2012 version of the pension ballot measure on the June 2012 election ballot.

49. The ballot measure language approved by the City Council on March 6, 2012, dramatically reduces the pension benefits of SJPOA-represented Police Officers in the same ways as the prior version approved by the City Council on December 6, 2011. The February 21, 2012 version of the pension reduction ballot measure adopted by the City Council on March 6, 2012 also includes new language dictating that the City will file as lawsuit seeking a declaration as to the legality of the various pension reduction provisions delineated in the measure.

50. These actions and plans were made by the City unilaterally and without providing the SJPOA with notice and an opportunity to "meet and confer ... before [the City] proposed charter amendments which affect matters within their scope of representation." (*Seal Beach, supra*, 36 Cal.3d at 602.)

The City Misrepresented Its Projected Pension Costs and Pushed Toward Declaring a So-Called "Fiscal State of Emergency"

51. On April 13, 2011, San Jose Mayor Chuck Reed and Vice Mayor Nguyen issued a press release announcing that "San José's retirement director has projected that [pension] costs could rise to $650 million per year by fiscal year 2015-2016 ...." This statement knowingly and recklessly misrepresented the City's potential pension liability.

52. On May 13, 2011, the City published a Memorandum re: Fiscal Concerns wherein Mayor Chuck Reed asserted that the City's pension costs were projected to grow to $650 million annually by 2016. Again, there was no basis for this assertion.

53. The $650 million figure was communicated by the Mayor and the City again and again in press releases, reports, and official City documents until approximately mid-November 2011.

54. The communications referenced in the preceding paragraphs were made even though the City's retirement director—the only source for the $650 estimation

according to the Mayor—had expressly disavowed any $650 million projection and had told the Mayor and the City that it should NOT be relied upon. The City had no other actuarially sound basis for projecting a $650 million pension projection for 2015-16.

55. The intent of the City in continuing to communicate the false $650 million projection was to whip-up public, media and political sentiment to support the City's plan to declare a fiscal emergency (discussed *infra*) and slash retirement and other benefits for Police Officers and other City civil servants. At all times that these representations were made, the City was aware that they were false and without any reasonable actuarial basis, such that the City "knowingly providing [the SJPOA] with inaccurate information regarding the financial resources of the public employer ... constitute[d] a refusal or failure to meet and negotiate in good faith." (Gov. Code § 3506.5(c).)

56. On February 8, 2012, NBC Channel 11, a San Jose area television station produced an investigative report alleging that the City had deliberately overstated its potential pension liability for political reasons. The report suggested that the City's overstatements were deliberate, and designed to support both the Mayor's budget proposal and his proposal for the Declaration of Fiscal Emergency. To wit, in an interview with NBC, when asked the basis for the $650 million city pension liability projection, Mayor Reed acknowledged that the sole source for the $650 million figure was the City's Retirement Services Director, Russell Crosby. In the same interview, Mr. Crosby stated about the $650 million estimation: "That was a number off the top of my head." He also stated that: "The Mayor was told not to use that number ... that the number was 400 [million dollars]."

57. In fact, on approximately February 21, 1012, the City's own retirement system's actuaries estimated that the actual future projection figure for Fiscal Year 2015-16 is approximately $310 million, less than half the level the City had consistently and knowingly misrepresented. In light of the developments regarding the City's improved financial condition and the dramatically-reduced projections of retirement related costs

over the next few years, any ostensible bargaining impasse was broken. (See *Kit Manufacturing Co., Inc. and Sheet Metal Workers Int'l Assoc., Local 213, AFL-CIO* (1962) 138 NLRB 1290, 1294-1295 [improvement in employer's financial condition breaks impasse].)

58. Undeterred, as recently as February 24, 2012, Mayor Reed was still publicly estimating that the City's pension liability could reach $650 million.

59. On February 28, 2012, five California State Assembly members and two State Senators requested that the California Legislature's Joint Legislative Audit Committee conduct an audit into the City's general finances and current and future pension obligations ("the State audit request"). They asked that: "The audit should focus on all projections used by the City and/or its elected officials that include, but may not be limited to, $400 million, $431 million, $570 million, and $650 million."

60. On March 7, 2012, the State of California's Joint Legislative Audit Committee ordered a state audit to determine, *inter alia*, whether the Mayor, City Council, or other officials engaged in any wrongdoing or legal violations in referencing the false $650 million projection. The committee directed the state auditor to give the audit priority status.

The City Continued to Refuse to Bargain Even After Its So-Called "Fiscal State of Emergency" Proved to be a Myth

61. As noted above, on approximately February 21, 1012, the City revised its estimate for the City's pension liability projection for Fiscal Year 2015-16 to approximately $310 million, less than half the level the City had consistently and knowingly misrepresented. In light of the developments regarding the City's improved financial condition and the dramatically-reduced projections of retirement related costs over the next few years, any ostensible bargaining impasse was broken. (See *Kit Manufacturing Co., Inc. and Sheet Metal Workers Int'l Assoc., Local 213, AFL-CIO* (1962) 138 NLRB 1290, 1294-1295 [improvement in employer's financial condition breaks impasse].)

62. Despite these revelations, the City continued to refuse to meet and confer with the SJPOA regarding its proposed ballot measure.

63. At all times mentioned herein, the defendants were able to perform its obligations under the MMBA. Notwithstanding such ability, the defendants failed and refused to perform its statutory duty under the MMBA.

64. Instead, the defendants submitted to the electorate of the City of San Jose a ballot measure designed to dramatically reduces the pension benefits of SJPOA-represented Police Officers, over which there had been no bargaining.

65. As the ballot measure passed on June 5, 2012, commencing on or about June 6, 2012, defendants have undertaken to act under color of the above-described defective and invalid charter amendment and, in doing so, has usurped, intruded into, and unlawfully held and exercised powers not belonging to it.

PRAYER

WHEREFORE, Plaintiff prays for the following relief:

1. For judgment determining that the above-described charter amendment is null and void and of no legal effect and that the defendants have unlawfully usurped the powers of the state of California in undertaking to act under color of the amendment; and

2. For any and all actual, consequential, and incidental damages according to proof, including but not limited to damages that have been or may be suffered by members of the SJPOA and all costs incurred by the SJPOA in attempting to invoke the statutory rights of the association and its members;

3. For attorneys' fees pursuant to California Code of Civil Procedure § 1021.5, Government Code § 800, or otherwise;

4. For costs of suit herein incurred and other fines pursuant to California Code of Civil Procedure § 809; and

5. For such costs and further relief as the Court deems just and proper.

Dated: _____, 2012

By _____
Attorney General for the State of California

Dated: _____, 2012

By _____
Deputy Attorney General for the State of California

Dated: June 21, 2012

CARROLL, BURDICK & McDONOUGH LLP

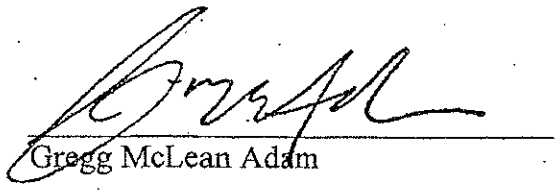
By _____
Gregg McLean Adam
Jonathan Yank
Jennifer Stoughton
Attorneys for Relator
San Jose Police Officers' Association

Attorneys for the People of the State of California

VERIFICATION

I, Gregg McLean Adam, am the relator in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein stated on information and belief and, as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 21st day of June, 2012 at San Francisco, California.



Gregg McLean Adam

EXHIBIT E

Gregg McLean Adam, No. 203436
Jonathan Yank, No. 215495
Jennifer S. Stoughton, No. 238309
CARROLL, BURDICK & McDONOUGH LLP
Attorneys at Law
44 Montgomery Street, Suite 400
San Francisco, CA 94104
Telephone: 415.989.5900
Facsimile: 415.989.0932
Email: gadam@cbmlaw.com
jyank@cbmlaw.com
jstoughton@cbmlaw.com

Attorneys for Proposed Relator
San Jose Police Officers' Association

BEFORE THE ATTORNEY GENERAL

OF THE STATE OF CALIFORNIA

SAN JOSE POLICE OFFICERS' ASSOCIATION,

Plaintiff-Relator,

v.

CITY OF SAN JOSE, and CITY OF SAN JOSE CITY COUNCIL,

Defendants.

No.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF SJPOA'S APPLICATION FOR LEAVE TO SUE IN *QUO WARRANTO*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES
(continued)

CONSTITUTIONS

I. INTRODUCTION

Proposed Relator San Jose Police Officers' Association ("Relator" or "SJPOA") hereby applies for leave to sue in *quo warranto* because the proposed Defendants, City of San Jose and the San Jose City Council (collectively "the City"), have proceeded with a ballot measure designed to dramatically cut employee pension benefits without first completing the collective bargaining process with the SJPOA, as required by the Meyers-Milias-Brown Act ("MMBA"), Government Code section 3500 *et seq.*[1] This measure, which was entitled "Measure B" on the ballot, was passed by the San Jose electorate on June 5, 2012. The City's actions were illegal under longstanding case precedent, and the issue is one of great importance to the citizens of this State, making an action in *quo warranto* proper.

II. FACTUAL HISTORY

On April 13, 2011, the City of San Jose and Mayor Chuck Reed began a push to declare a "fiscal emergency," when Mayor Reed and Vice Mayor Nguyen issued a press release announcing that "San José's retirement director has projected that [pension] costs could rise to $650 million per year by fiscal year 2015-2016 …." (Verified Statement of Facts ("VSOF"), ¶ 4.) The City then published a Memorandum re: Fiscal Concerns on May 13, 2011, wherein Mayor Reed reiterated these assertions. (VSOF, ¶5.)

On June 20, 2011, the SJPOA and the City agreed to bargain over retirement benefit reforms and the Mayor's anticipated—but as yet unseen—ballot measure with the somewhat optimistic goal of reaching an agreement by October 31, 2011.[2] (VSOF, ¶10.) Over the following four months, the parties met approximately 13 times.[3] (VSOF, ¶¶ 13-

---

[1] The MMBA (Gov. Code § 3500, *et seq.*) is the statutory scheme giving rise to and governing labor-management relations between the SJPOA and the City.

[2] The SJPOA did not waive its right to bargain over the City's ballot reform measures in the event negotiations were not completed by that date. (VSOF, ¶ 10.)

[3] The SJPOA was bargaining in coalition with firefighters represented by IAFF, Local 230. (VSOF, ¶ 10.)

described the revised ballot measure as "far different than the earlier version." (VSOF, ¶ 20.)

Wishing to respond and bargain over the City's newly-refined ballot measure, on December 1, 2011, SJPOA President Jim Unland sent a letter to Deputy City Manager Alex Gurza containing a Revised SJPOA "Retirement Proposal" reflecting further monetary concessions by the SJPOA, including a rollback to the retirement plan in place in 1997. (VSOF, ¶ 21.) The City still refused to meet and confer with the SJPOA, continuing to assert that the parties were at impasse. (VSOF, ¶ 22.)

At the same time, the independent actuaries for the City's Police and Fire Retirement System produced revised projections showing that the City's retirement contribution to that system in Fiscal Year 2012–13 would be $55 million *less than* previously predicted. (VSOF, ¶ 23.) The Mayor immediately scrapped plans to declare a "fiscal emergency" at the City Counsel meeting on December 6, 2011. (VSOF, ¶ 24.) But at that same meeting, the City Council, without providing the SJPOA with notice or an opportunity to bargain, approved yet another revised measure (drafted on December 5) for placement on the June 2012 election ballot. (VSOF, ¶ 25.) Thereafter, the City continued to insist that the parties remained at impasse, in spite of repeated pleas by the SJPOA to resume bargaining and concessionary offers by the SJPOA worth tens of millions of dollars per year. (VSOF, ¶¶ 26-28.)

While continuing to refuse to bargain with the SJPOA, Mayor Reed admitted in a February 9, 2012 televised interview on NBC Channel 11 that, all along, the sole source for the $650 million figure was an isolated oral statement by the City's Retirement Services Director, Russell Crosby. (VSOF, ¶ 29.) But in an interview that was part of the same news story, Mr. Crosby stated that the $650 million estimation "was a number off the top of my head" and ***"[t]he Mayor was told not to use that number***, that the number was 400 [million dollars], that was the projection." (VSOF, ¶ 29.) In fact, in February 2012, the City retirement system's actuaries projected that pension costs for Fiscal Year

2015-16 will be approximately $310 million, *less than half* of the amount the City had been publicizing. (VSOF, ¶ 32.)

Even though it was then clear that the City lacked any basis for its alleged "fiscal crisis," on February 21, 2012, the City's Director of Labor Relations provided the SJPOA with yet another version of the City's "Pension Plan Amendments" ballot proposition and informed the SJPOA that the City Council would take a final vote on March 6, 2012 to place it on the June 2012 election ballot. (VSOF, ¶ 30.) In a memorandum attached to the draft, City Manager Debra Figone admitted that it contained "many significant changes and movements from earlier drafts." (VSOF, ¶ 31.) These included, *inter alia*, changes to the penalties that would accrue for individuals who did not "volunteer" for the new reduced tier. (VSOF, ¶¶ 30-31.) The new version also included new language moving the effective date for one key provision to June 23, 2013. (VSOF, ¶ 30.)

On February 24, 2012, the SJPOA sent a letter to Deputy City Manager Alex Gurza requesting that the City reconvene bargaining in light of the foregoing admission and the fact that the SJPOA "had no opportunity to bargain about this new ballot language." (VSOF, ¶ 33.) But in a February 27, 2012 response, Deputy City Manager Alex Gurza expressly conditioned any resumption of bargaining on the SJPOA (1) making a concession that the City deemed, in its subjective opinion, to be "sufficient" and (2) that such concession be capable of being "ratified prior to March 6." (VSOF, ¶ 34.)

In an attempt to meet the City's demands, the SJPOA sent a new proposal to the City on March 2, 2012 that guaranteed tens of millions of dollars in savings per year to the City. (VSOF, ¶¶ 36-37.) The City responded on March 5, 2012 by admitting that the SJPOA had made significant movement on a number of issues. (VSOF, ¶ 38.) Nonetheless, the City rejected the SJPOA's request to resume bargaining because, according to the City, the timing of the proposal "render[ed] further bargaining impractical [before] March 6th—the final City Council meeting before the last date to place this measure on the June 2012 ballot." (VSOF, ¶ 38.)

On March 6, 2012, the San Jose City Council passed a resolution ordering that the "Pension Plan Amendments" ballot proposition be placed on the June 5, 2012 ballot. (VSOF, ¶ 39.) At the meeting, the City counsel also added to the ballot proposition a provision dictating that, if adopted by the voters, the City would file a lawsuit seeking a declaratory judgment on the legality of its various pension reduction provisions. (VSOF, ¶ 39.) Measure B was printed on the June 2012 ballot, and passed by the San Jose electorate on June 5, 2012. (VSOF, ¶ 41.)

Consequently, despite a significant change in City's financial projections regarding retirement costs, the City vastly changing the language of its ballot measure during the relevant time frame, and repeated concessionary proposals by the SJPOA, the City refused to bargain with the SJPOA over the ballot measure from November 2011 until March 6, 2012, when the City Council voted to approve the ballot measure going to the voters. In taking these unilateral actions without satisfying its bargaining obligation, the City committed a *per se* refusal to bargain under the MMBA. (See *California State Employees' Assn.* (1996) 51 Cal.App.4th 923, 934.)

III. DISCUSSION

A. Standards for Granting Leave to Sue in *Quo Warranto*

> California Code of Civil Procedure section 803 states:
> An action may be brought by the attorney-general, in the name of the people of this state … upon a complaint of a private party, against any person who usurps, intrudes into, or unlawfully holds or exercises any public office, civil or military, or any franchise, or against any corporation, either de jure or de facto, which usurps, intrudes into, or unlawfully holds or exercises any franchise, within this state. And the attorney-general must bring the action, whenever he has reason to believe that any such office or franchise has been usurped, intruded into, or unlawfully held or exercised by any person, or when he is directed to do so by the governor.

"In determining whether to grant leave to sue in quo warranto the Attorney General considers (1) whether the application has raised a substantial question of fact or issue of

law which should be decided by a court and (2) whether it would be in the public interest to grant leave to sue." (76 Ops. Cal. Atty. Gen. 169, 171)

> It should be borne in mind that in passing on applications for leave to sue in quo warranto, the Attorney General ordinarily does not decide the issues presented, but determines only whether or not there is a substantial question of law or fact which calls for judicial decision.

(25 Ops. Cal. Atty. Gen. 237, 240 (emphasis added) [citing 17 Ops. Cal. Atty. Gen. 46, 47; 24 Ops. Cal. Atty. Gen. 146, 151-52]; see also 19 Ops. Cal. Atty. Gen. 87; 17 Ops. Cal. Atty. Gen. 136; 19 Ops. Cal. Atty. Gen. 46.)

The California courts agree with this position. For example, in *International Assoc. of Firefighters v. City of Oakland* (1985) 174 Cal.App.3d 687, 698, the Court of Appeal stated the following:

> [I]n a case within a statute authorizing the attorney general or state's attorney to institute the proceeding, or apply for leave of court to institute it, at the insistence of private persons, if private rights or grievances are involved, the consent of the officer is essential, but he has no arbitrary and uncontrolled discretion; the only discretion vested in him is to determine whether the documents and evidence presented to him are in proper legal form and prima facie sufficient, and, if they are, it is his duty to sign the petition and present it to the court.

In the present case, the proposed Relator has shown it has a *prima facie* case against the City for its illegal actions. The proposed complaint, the facts summarized *supra*, and the discussion below set forth that the City failed to satisfy its obligation to meet and confer with the SJPOA before putting a ballot measure which amended the City's charter up for a vote. As stated previously by the California Attorney General, "[w]hether [a charter] amendment is valid or not presents substantial questions of fact and law with respect to the actions of the parties in complying with the provisions of the MMBA." (76 Ops. Cal. Atty. Gen. 169, 172.) Therefore, it is clear that the proposed Relator's application contains substantial questions of law and fact.

B. Pursuant to the Meyers-Milias-Brown Act, the City Was Required to Bargain With the SJPOA Prior to Deciding to Place Measure B Before the Voters, But It Failed to Fulfill This Obligation

Under the MMBA, a city is "required to meet and confer with [an impacted union] *before* it propose[s] charter amendments which affect matters within their scope of representation." (*People ex rel. Seal Beach Police Officers Assn. v. City of Seal Beach* (1984) 36 Cal.3d 591, 602 [emphasis added]). "A public employee's pension constitutes an element of compensation" (*Betts v. Board of Administration* (1978) 21 Cal.3d 859, 863) and, as such, is a mandatory subject of bargaining (*Claremont Police Officers Ass'n v. City of Claremont* (2006) 39 Cal.4th 623, 634). Here, the SJPOA is the exclusive bargaining representative under the MMBA for City-employed police officers. (VSOF, ¶ 2.)

Consequently, for purposes of proposing a charter amendment that would impact the pension rights of the City's police officers, the City must meet and confer in good faith with the SJPOA over the proposed amendment. (Gov. Code §§ 3504, 3505). The City cannot unilaterally reduce police officers' benefits through a charter amendment without providing the SJPOA with reasonable notice and a full opportunity to bargain, resolve any differences, and reach agreement prior to implementation. (Gov. Code § 3504.5.) Moreover, the City's duty to bargain is not reduced or excused simply because it may have believed the proposed charter amendment was important in light of its alleged fiscal crisis. (See *Santa Clara County Registered Nurses Assoc.* ("*Santa Clara Nurses*") (2010) PERB Decision No. 2120-M, p. 17 ["The mere fact that [a public employer] thought the inclusion of the measure on the ... ballot was desirable does not constitute a compelling operational necessity sufficient to set aside its bargaining obligation."])[4]

---

[4] The Public Employment Relations Board ("PERB") is the California administrative agency generally charged with construing and administering the MMBA. (Gov. Code §§ 3501 and 3509.) While PERB does not have jurisdiction over cases involving labor associations representing police officers (Gov. Code § 3511), courts give great deference to its construction of the labor statutes within its purview. (*Banning Teachers Assn. v. Public Employment Relations Bd.* (1988) 44 Cal.3d 799, 804–805.)

Given its duties under the MMBA, the City could only vote the pension reform measure onto the ballot after bargaining to agreement or impasse with the SJPOA. (See *Santa Clara Nurses*, PERB Decision No. 2120-M, at p.14 ["the County breached its duty to meet and confer in good faith when it failed to bargain the Prevailing Wage Measure to agreement or impasse prior to placing it on the ballot"].) While the parties obviously did not reach an agreement, they also did not reach an impasse over the City's pension reform proposals, as evidenced by the City's repeated (and admitted) revisions to those proposals and the SJPOA's repeated efforts to meet and confer and make concessionary proposals, as detailed above. Placing the proposed charter amendments on the ballot without bargaining to agreement or impasse was a violation of the MMBA. Indeed, prior to reaching impasse "[a]n employer's unilateral change in terms and conditions of employment within the scope of representation is, absent a valid defense, a *per se* refusal to negotiate ...." (*California State Employees' Assn., supra*, 51 Cal.App.4th at 934 [emphasis added].) Because the City did not reach an impasse with the SJPOA, it was required to continue bargaining, and its failure to do so while changing the terms and conditions of the City's police officers' retirement and disability benefits constitutes a violation of the MMBA.

In light of the foregoing, the SJPOA has presented a prima facie case that the City improperly placed Measure B before the San Jose electorate and, consequently, whether the charter amendments to be effected by Measure B are valid. And "[w]hether [a charter] amendment is valid or not presents substantial questions of fact and law with respect to the actions of the parties in complying with the provisions of the MMBA" and satisfies the prerequisites to suing in *quo warranto*. (76 Ops. Cal. Atty. Gen. 169, 172.)

C. The City's Failure to Bargain Constitutes an Illegal Exercise of a Franchise Which Is Only Remedied Through an Action in *Quo Warranto*

As noted *supra*, the Supreme Court held that a charter city must comply with the meet and confer requirements of the MMBA before it proposes an amendment concerning the terms and conditions of public employment to its charter. (*Seal Beach*, 36

Cal.3d at 602.) And it is well established that, for purposes of suing under Code of Civil Procedure section 803 ("Section 803"), "[a] city charter is ... a franchise. ...[and i]t has long been held that the proper remedy to attack the validity of a city charter amendment is through a quo warranto action." (76 Ops. Cal. Atty. Gen. 169, 171 [citing *Seal Beach, supra,* 36 Cal.3d at 595]; *Oakland Municipal Improvement League* v. *City of Oakland* (1972) 23 Cal.App.3d 165, 168-169.)

> [P]ublic corporations of any character whatsoever, exercising governmental functions, do so by reason of a delegation to them of a part of the sovereign power of the state. Where they are claiming to act and are actually functioning without having complied with the necessary prerequisites, they are usurping franchise rights as against paramount authority, to complain of which it lies only within the right of the state itself.

(*Int'l Ass'n of Fire Fighters, supra*, 174 Cal.App.3d at 694 [quoting *Van Wagener, supra*, 58 Cal.App. at 120.) "Since an action in the nature of quo warranto will lie to test the regularity of proceedings by which municipal charter provisions have been adopted, it follows that, once those provisions have become effective, their procedural regularity may be attacked *only* in quo warranto proceedings." (*Id.* at 694 [emphasis added] [citing *Taylor* v. *Cole* (1927) 201 Cal. 327, 333, 338-340]

Thus, the Attorney General has "upon prior occasions granted leave to sue in quo warranto in charter amendment challenges" similar to the present matter. (76 Ops. Cal. Atty. Gen. at 172 [citing *Seal Beach, supra,* 36 Cal.3d at 595]; see also *City of Fresno v. People ex rel. Fresno Firefighters, IAFF Local 753* (1999) 71 Cal.App.4th 82, 89 [citing 76 Ops. Cal. Atty. Gen. 169].) In fact, as recently as June 11, 2012, the Attorney General granted leave to sue in *quo warranto* to the Bakersfield Police Officers Association in a matter with close similarities to the present matter, where the association alleged that the City of Bakersfield failed to comply with its meet and confer obligation prior to placing a pension reform measure before the city's electorate.

Under the above-referenced authorities, an action in *quo warranto* is the necessary and proper procedure to challenge the validity of Measure B and its revisions to

the San Jose City Charter. The SJPOA alleges and has presented a *prima facie* case that the City of San Jose usurped the franchise rights granted to it by the State of California when it refused to meet and confer or otherwise bargain with the SJPOA about its proposed charter amendments prior to placing Measure B before the San Jose electorate. These prerequisites having been met, the SJPOA's Application for Leave to Sue in *Quo Warranto* should be granted. (*Int'l Ass'n of Fire Fighters, supra*, 174 Cal.App.3d at 698 ["the only discretion vested in [the Attorney General] is to determine whether the documents and evidence presented to him are in proper legal form and prima facie sufficient, and, if they are, it is his duty to sign the petition and present it to the court"].) "[w]hether [a charter] amendment is valid or not presents substantial questions of fact and law with respect to the actions of the parties in complying with the provisions of the MMBA." (76 Ops. Cal. Atty. Gen. 169, 172.)

D. The SJPOA's Proposed Action in *Quo Warranto* Is of Great Importance to the Citizens of This State

The MMBA reflects the strong public policy of the State of California of avoiding labor strife and ensuring that labor disputes are settled through the processes delineated. (See Gov. Code § 3500; *International Assn. of Fire Fighters Union v. City of Pleasanton* (1976) 56 Cal.App.3d 959, 968.) Thus, the crux of the dispute—i.e., whether the City satisfied its obligations under the MMBA—not only implicates the rights of hundreds of thousands of municipal employees throughout California, but the broader public policy served by California's labor relations statutes.

Moreover, because Measure B would reduce pension benefits for current employees and retirees, it implicates benefits that are indisputably subject to protection under the "contracts" [5] clause of the California State Constitution. (*Kern v. City of Long Beach* (1947) 29 Cal. 2d 848, 851-53 ["...public employment gives rise to certain obligations which are protected by the Contract Clause of the Constitution..."].) Thus, a

[5] Cal. Const., Art. I, Sec. 9 ("a ... law impairing the obligation of contracts may not be passed.").

determination as to the propriety of the charter amendments called for in Measure B is likely to impact the rights and obligations of employees and their employers throughout the State of California.

In light of these broad policy implications, the California Attorney General has previously concluded in matters similar to the present controversy that it is in the public interest to permit suit in *quo warranto*. (76 Ops. Cal. Atty. Gen. 169, 172 ["We believe that *Seal Beach* governs here and that the same public interest and purposes are present: to resolve important questions of fact and law and to settle labor strife in the public sector."]; June 11, 2012 Attorney General Decision No. 11-702 ["we conclude that the question of Measure D's validity, and that of the [pension] ordinances it gave rise to, are matters of public interest, and that it would therefore serve the public interest for them to be properly adjudicated"].) As in those instances, leave to sue in *quo warranto* should be granted here.

IV. CONCLUSION

For the foregoing reasons, the San Jose charter amendments enacted on the June 5, 2012 ballot constitute an illegal exercise of a franchise by the City and a public harm. *Quo warranto* is the proper and exclusive method for remedying this harm. Therefore, the SJPOA respectfully requests that its application for leave to sue in quo warranto be granted.

Dated: June 21, 2012

CARROLL, BURDICK & McDONOUGH LLP

By _____
Gregg McLean Adam
Jonathan Yank
Jennifer Stoughton
Attorneys for Proposed Relator
San Jose Police Officers' Association

EXHIBIT F

CBM CARROLL, BURDICK & McDONOUGH LLP

September 28, 2012

Carroll, Burdick & McDonough LLP
44 Montgomery Street
Suite 400
San Francisco, CA
94104-4606
415.989.5900
415.989.0932 Fax
www.cbmlaw.com

Los Angeles
Sacramento

Jonathan Yank
Direct Dial: 415.743.2413
jyank@cbmlaw.com

VIA EMAIL AND REGULAR MAIL

Marc J. Nolan
Deputy Attorney General
Department of Justice
300 South Spring Street, Suite 1702
Los Angeles, CA 90013

Re: Quo Warranto Application in *San Jose Police Officers' Assn. v. City of San Jose and City of San Jose City Council*
Your File No.: LA2012106837
File No. 038781

Dear Mr. Nolan:

We write in response to your letter, dated September 18, 2012, in which you requested information pertaining to six other legal actions regarding the recently-passed "Measure B" in the City of San Jose. To the extent such information is known to the San Jose Police Officers' Association ("the SJPOA"), the information you requested is provided below. However, as indicated in the SJPOA Reply papers, not one of these other legal actions seeks, or is capable of delivering, the relief requested here on behalf of the SJPOA.

You specifically requested information about Santa Clara Superior Court Case No. 1-12-CV-220795. That matter, which was filed by our office on behalf of the SJPOA, sought to enjoin placement of Measure B on the June 5, 2012 ballot, as well as an order compelling the City of San Jose to resume bargaining with the SJPOA over pension reform proposals. Preliminary injunctive relief was denied in that matter and, because Measure B was passed by the voters, the case is now moot. Furthermore, the operative pleading cannot be amended to seek the relief requested in the SJPOA's proposed *quo warranto* action (i.e., rescission of now-effective changes to the San Jose City Charter). "Since an action in the nature of *quo warranto* will lie to test the regularity of proceedings by which municipal charter provisions have been adopted, it follows that, once those provisions have become effective, their procedural regularity may be attacked *only* in *quo warranto* proceedings." (*International Assoc. of Firefighters v. City of Oakland* (1985) 174 Cal.App.3d 687, 694 [citing *Taylor* v. *Cole* (1927) 201 Cal. 327, 333, 338-340].)

Santa Clara Superior Court Case No. 1-12-CV225926 was filed by our office on behalf of the SJPOA to challenge the *substantive legality* of only *particular amendments* to the San Jose City Charter brought about by the passage of Measure B. (See Exhibit B to Holtzman Declaration.) It does not and cannot (for the reasons stated *supra*) attack the *procedural validity* of Measure B, and it does not seek to invalidate *all of Measure B*. Thus, this lawsuit does not address and cannot redress the violations of the Meyers-Milias-Brown Act ("MMBA") (Gov Code § 3500 *et seq.*) at issue in the SJPOA's proposed *quo warranto* action.[1]

The SJPOA is unaware of the status of the remaining four legal actions, all of which are before the California Public Employment Relations Board ("PERB"). However, based on my experience as a practitioner of public sector labor law, the process of taking cases from start to finish at PERB is extremely long and laborious.[2] More critically, as pointed out in the Reply, the SJPOA is not a party to those matters and PERB has no jurisdiction over the SJPOA or its labor relations with the City of San Jose. (Gov. Code § 3511.)

We hope this information is of some assistance. Please do not hesitate to contact the undersigned if you have any additional questions or concerns.

Very truly yours,

CARROLL, BURDICK & McDONOUGH LLP

Jonathan Yank

JY:jag
cc: Kamala D. Harris, Attorney General
Jonathan V. Holtzman, Esq.
Jim Unland, President, SJPOA

---

[1] As the City of San Jose noted in its Opposition, Case No. 1-12-CV225926 does charge a violation of the MMBA. However, the challenge is substantive, not procedural—it alleges that one provision of Measure B purports to unlawfully narrow the mandatory scope of bargaining in violation of the MMBA.

[2] The process includes a prehearing settlement conference, hearing (i.e., an administrative trial), post-hearing briefing, a decision by an administrative law judge, an appeal to the PERB Board itself, and an appeal to the California Court of Appeal. This entire process, depending on the case, can take years.

Arthur A. Hartinger (SBN: 121521)
ahartinger@meyersnave.com
Linda M. Ross (SBN: 133874)
lross@meyersnave.com
Jennifer L. Nock (SBN: 160663)
jnock@meyersnave.com
Michael C. Hughes (SBN: 215694)
mhughes@meyersnave.com
MEYERS, NAVE, RIBACK, SILVER & WILSON
555 12th Street, Suite 1500
Oakland, California 94607
Telephone: (510) 808-2000
Facsimile: (510) 444-1108

Attorneys for Defendant
City of San Jose

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SANTA CLARA

SAN JOSE POLICE OFFICERS' ASSOCIATION, Plaintiff, v. CITY OF SAN JOSE, BOARD OF ADMINISTRATION FOR POLICE AND FIRE RETIREMENT PLAN OF CITY OF SAN JOSE, and DOES 1-10 inclusive. Defendants, AND RELATED CROSS-COMPLAINT AND CONSOLIDATED ACTIONS	**Case No. 1-12-CV-225926** *[Consolidated with Case Nos. 112CV225928, 112CV226570, 112CV226574, 112CV227864]* *Assigned for all purposes to the Honorable Patricia M. Lucas* **AMENDED NOTICE OF MOTION AND MOTION FOR JUDGMENT ON THE PLEADINGS AS TO THE SAN JOSE POLICE OFFICERS' ASSOCIATION'S SEVENTH CAUSE OF ACTION FOR VIOLATION OF THE MEYERS-MILIAS-BROWN ACT** Date: January 29, 2013 Time: 9:00 a.m. Courtroom: 2 Complaint Filed: June 6, 2012 Trial Date: None Set

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that based on the order of the Honorable Patricia M. Lucas, the January 17, 2013 hearing date is rescheduled to January 29, 2013. On January 29, 2013 at 9:00 a.m. in Department 2 of the above-entitled Court, located at 191 North First Street San Jose, California 95113, or as soon thereafter as the matter may be heard, Defendant City of San Jose ("City") moves for judgment on the pleadings pursuant to Section 438 of the Code of Civil

Procedure as to the Seventh Cause of Action brought by the San Jose Police Officers' Association for violation of the Meyers-Milias-Brown Act.

The City's motion is based on this Amended Notice and Motion, the already filed Memorandum of Points and Authorities and Request For Judicial Notice, all other pleadings and papers on file in this action, and such other and further argument and matters subject to judicial notice as shall be received by the Court at the time of the hearing.

The City has provided a proposed order that grants the motion.

DATED: December 26, 2012

MEYERS, NAVE, RIBACK, SILVER & WILSON

By: _____

Arthur A. Hartinger
Linda M. Ross
City of San Jose

2019091.1

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF ALAMEDA

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the County of Alameda, State of California. My business address is 555 12th Street, Suite 1500, Oakland, CA 94607.

On December 26, 2012, I served true copies of the following documents described as:

- **AMENDED NOTICE OF MOTION AND MOTION FOR JUDGMENT ON THE PLEADINGS BY CITY OF SAN JOSE**

on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Meyers, Nave, Riback, Silver & Wilson's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

BY E-MAIL OR ELECTRONIC TRANSMISSION: I caused a copy of the document(s) to be sent from e-mail address jfoley@meyersnave.com to the persons at the e-mail addresses listed in the Service List. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on December 26, 2012, at Oakland, California.

JILALA H. FOLEY

SERVICE LIST

John McBride Christopher E. Platten Mark S. Renner WYLIE, MCBRIDE, PLATTEN & RENNER 2125 Canoas Garden Ave, Suite 120 San Jose, CA 95125 E-MAIL: jmcbride@wmprlaw.com cplatten@wmprlaw.com mrenner@wmprlaw.com	Attorneys for Plaintiffs/Petitioners, ROBERT SAPIEN, MARY MCCARTHY, THANH HO, RANDY SEKANY AND KEN HEREDIA (Santa Clara Superior Court Case No. 112CV225928) AND Plaintiffs/Petitioners, JOHN MUKHAR, DALE DAPP, JAMES ATKINS, WILLIAM BUFFINGTON AND KIRK PENNINGTON (Santa Clara Superior Court Case No. 112CV226574) AND Plaintiffs/Petitioners, TERESA HARRIS, JON REGER, MOSES SERRANO (Santa Clara Superior Court Case No. 112CV226570)
Gregg McLean Adam Jonathan Yank Gonzalo Martinez Jennifer Stoughton CARROLL, BURDICK & MCDONOUGH, LLP 44 Montgomery Street, Suite 400 San Francisco, CA 94104 E-MAIL: gadam@cbmlaw.com jyank@cbmlaw.com gmartinez@cbmlaw.com jstoughton@cbmlaw.com awest@cbmlaw.com	Attorneys for Plaintiff, SAN JOSE POLICE OFFICERS' ASSOC. (Santa Clara Superior Court Case No. 112CV225926)
Teague P. Paterson Vishtap M. Soroushian BEESON, TAYER & BODINE, APC Ross House, 2nd Floor 483 Ninth Street Oakland, CA 94607-4051 E-MAIL: tpaterson@beesontayer.com; vsoroushian@beesontayer.com;	Plaintiff, AFSCME LOCAL 101 (Santa Clara Superior Court Case No. 112CV227864)

Harvey L. Leiderman REED SMITH, LLP 101 Second Street, Suite 1800 San Francisco, CA 94105 E-MAIL: hleiderman@reedsmith.com;	Attorneys for Defendant, CITY OF SAN JOSE, BOARD OF ADMINISTRATION FOR POLICE AND FIRE DEPARTMENT RETIREMENT PLAN OF CITY OF SAN JOSE (Santa Clara Superior Court Case No. 112CV225926) AND Necessary Party in Interest, THE BOARD OF ADMINISTRATION FOR THE 1961 SAN JOSE POLICE AND FIRE DEPARTMENT RETIREMENT PLAN (Santa Clara Superior Court Case No. 112CV225928) AND Necessary Party in Interest, THE BOARD OF ADMINISTRATION FOR THE 1975 FEDERATED CITY EMPLOYEES' RETIREMENT PLAN (Santa Clara Superior Court Case Nos. 112CV226570 and 112CV226574) AND Necessary Party in Interest, THE BOARD OF ADMINISTRATION FOR THE FEDERATED CITY EMPLOYEES RETIREMENT PLAN (Santa Clara Superior Court Case No. 112CV227864)

2006323.1

Gregg McLean Adam, No. 203436
Jonathan Yank, No. 215495
Gonzalo C. Martinez, No. 231724
Amber L. West, No. 245002
CARROLL, BURDICK & McDONOUGH LLP
Attorneys at Law
44 Montgomery Street, Suite 400
San Francisco, CA 94104
Telephone: 415.989.5900
Facsimile: 415.989.0932
Email: gadam@cbmlaw.com

Attorneys for Plaintiff
San Jose Police Officers' Association

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SANTA CLARA

SAN JOSE POLICE OFFICERS' ASSOCIATION,

Plaintiff,

v.

CITY OF SAN JOSE, BOARD OF ADMINISTRATION FOR POLICE AND FIRE DEPARTMENT RETIREMENT PLAN OF CITY OF SAN JOSE, and DOES 1-10, inclusive,

Defendants.

AND ACTIONS CONSOLIDATED FOR PRETRIAL PURPOSES

CITY OF SAN JOSE,

Cross-Complainant,

v.

SAN JOSE POLICE OFFICERS' ASSOCIATION, *et al.*

Cross-Defendants.

No. 1-12-CV-225926
(and Consolidated Actions 1-12-CV-225928, 1-12-CV-226570, 1-12-CV-226574, and 1-12-CV-227864)

PLAINTIFF SAN JOSE POLICE OFFICERS' ASSOCIATION'S OPPOSITION TO DEFENDANT CITY OF SAN JOSE'S MOTION FOR JUDGMENT ON THE PLEADINGS REGARDING VIOLATION OF MEYERS-MILIAS-BROWN ACT (SEVENTH CAUSE OF ACTION)

Date: January 29, 2013
Time: 9:00 a.m.
Dept. 2

Complaint Filed: June 6, 2012
Trial Date: None Set

BY FAX

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

State Cases

State Statutes

TABLE OF AUTHORITIES
(continued)

Page(s)

I. INTRODUCTION

The City of San Jose ("City") filed two separate motions for judgment on the pleadings against the First Amended Complaint ("FAC") of plaintiff San Jose Police Officers' Association ("SJPOA"). This opposition brief addresses the City's motion as to SJPOA's Seventh Cause of Action for Violation of the Meyers-Milias-Brown Act ("MMBA").[1]

The core of SJPOA's MMBA claim is that the City—through Sections 1506-A, 1512-A, and 1514-A of Measure B—violated its statutory duty to meet and confer and to bargain to impasse before unilaterally reducing employee salaries under the *existing* MOA, and further that Measure B would make any meet and confer meaningless as to *future* contacts.[2]

The City makes several scattershot arguments that do not support judgment as a matter of law, let alone satisfy the City's burden of demonstrating the FAC does not state a claim. As outlined below, the City misconstrues the FAC's allegations and inexplicably ignores whole swaths of the FAC detailing the facts giving rise to plaintiff's claims. Indeed, rather than examining the facts pled in the FAC, the City often relies on its own interpretation of Measure B—the underlying charter amendment the FAC challenges. The City also inappropriately advances merits arguments and invites this Court to dismiss based on documents external to the complaint and not properly subject to judicial notice. These are not proper pleading attacks. The City does not demonstrate that it is entitled to judgment as a matter of law, and its motion should be denied in its entirety.

II. RELEVANT PROCEDURAL HISTORY

SJPOA filed its initial complaint on June 6, 2012, which brought several statutory and constitutional challenges to Measure B, a voter-enacted charter amendment

---

[1] SJPOA's opposition to the City's other motion is in a separate, concurrently filed brief.

[2] Although the Seventh Cause of Action itself does not specifically plead violation of Section 1514-A, it incorporated all prior allegations, including those regarding Section 1514-A. (See FAC ¶¶ 60, 103.) If granted leave to amend, SJPOA would amend its complaint to plead facts supporting violation of Section 1514-A. (See fn.4, *infra*.)

proposed by the City of San Jose that unlawfully infringes on police officers' vested pension rights and violates their existing collective bargaining agreement ("memorandum of agreement" or "MOA"). It filed the FAC on July 5, 2012. As relevant here, the FAC alleges Measure B violates the Meyers-Milias-Brown Act ("MMBA") (Seventh Cause of Action) and the following provisions of the California Constitution: the Right to Petition (Fourth Cause of Action); the Separation of Powers Doctrine (Fifth Cause of Action); and the constitutional Pension Protection Act (Eighth Cause of Action). The constitutional claims further allege violation of Civil Code section 52.1, the California Civil Rights Act.

The City filed its first motion for judgment on the pleadings against the MMBA claim on November 28, 2012 ("MJOP 1"). It filed a second motion for judgment on the pleadings against certain constitutional claims and the Section 52.1 allegations on December 19 ("MJOP 2").[3] Defendant Board of Administration for Police and Fire Department Retirement Plan of City of San Jose ("Retirement Board"), which the FAC named as a necessary and indispensible party (FAC ¶ 10), did not file its own motion or otherwise join in those of the City.

III. JUDGMENT ON THE PLEADINGS IS PROPER ONLY WHEN A COMPLAINT FAILS TO STATE SUFFICIENT FACTS CONSTITUTING A CAUSE OF ACTION

A motion for judgment on the pleadings has the same function as a general demurrer; it attacks only defects disclosed on the face of the FAC or matters that are judicially noticeable. (Code of Civ. Proc. § 438; *Fleishman v. Superior Court* (2002) 102 Cal.App.4th 350, 354.) All allegations in the FAC are deemed true and liberally construed. (*Gerawan Farming, Inc. v. Lyons* (2000) 24 Cal. 4th 468, 515-16; Code of Civ. Proc. § 438(d).) The motion is granted only when plaintiffs have failed to state a claim for relief, but plaintiffs must be granted leave to amend if they can show that they could state a claim for relief. (*Virginia G. v. ABC Unified School Dist.* (1993) 15 Cal.App.4th 1848, 1852 ["Where . . . a motion for judgment on the pleadings is granted . .

[3] The City also sought dismissal of several claims brought by AFSCME in its complaint against the City. (See MJOP 2, generally.)

. denial of leave to amend constitutes an abuse of discretion if the pleading does not show on its face that it is incapable of amendment"].)

IV. SJPOA SUFFICIENTLY PLEADS VIOLATION OF THE MMBA BECAUSE THE CITY VIOLATED THE PARTIES' EXISTING MOA AND BECAUSE MEASURE B LEAVES THE CITY NO DISCRETION OVER CERTAIN MANDATORY SUBJECTS OF BARGAINING (SEVENTH CAUSE OF ACTION)

The City asserts the MMBA claim must be dismissed because the FAC does not plead a violation of the parties' existing MOA, and because SJPOA's "only potential cause of action is for violation of the MMBA's procedural requirements" (MJOP 1 at 5:14-15) which can only be resolved in a *quo warranto* action. That is incorrect.

A. The FAC Alleges Measure B Violates the City's MMBA Duty to Meet and Confer in Good Faith as to the Existing Contract and as to Future Collective Bargaining Negotiations

Under the MMBA, the City has a duty to meet and confer regarding matters impacting the wages, hours, and other terms and conditions of employment for police officers, and thus may not take unilateral action affecting such terms. (See Gov. Code § 3504.5; FAC ¶ 104.) The FAC alleges that the City unilaterally changed the terms and conditions of employment without meeting and conferring and/or bargaining to impasse. (FAC ¶ 104.) The FAC clearly pleads facts alleging breach of the parties' *existing* MOA, which constitutes an MMBA violation. Specifically, that Section 1506-A of Measure B directs that police officers' existing contractual salaries be cut by 16% "without requiring the City to bargain over such reductions" and that even if bargaining were to take place it would be meaningless because "the amount of salary reductions [is] non-negotiable." (FAC ¶ 105; see also *id.* ¶¶ 37-38 and 40-48.) The FAC further alleges that Section 1512-A effectively reduces existing contractual salaries by requiring employees to pay more for retiree healthcare benefits. (*Id.* ¶¶ 106, 56-57). The MMBA claim also incorporates the FAC's other allegations regarding the City's violation of existing MOA provisions. (*Id.* ¶¶ 103, 98-102.)

These allegations also support a claim of violation of the MMBA as to *future* contracts because Measure B would make the meet and confer process meaningless by

making salary reductions, including the amount thereof, non-negotiable under Section 1506-A of Measure B. (See *id.* ¶¶ 105-106.) Moreover, although not specifically pled, that illegality additionally extends to Section 1514-A because it too directs that the salary reductions in Section 1506-A "shall" be enforced if Section 1506-A itself is declared unlawful, without any obligation to bargain over the reductions themselves or their amount. (See FAC ¶¶ 60, 103; City's RJN Ex. A, at p. 16 [Section 1514-A].)[4]

Separately, the FAC further alleges Measure B eliminates the union's ability to bargain over future increases to retiree healthcare benefits. (*Id.* at ¶ 106.)

There are thus several separate bases for SJPOA's MMBA claim. That is fatal to the City's motion because it presumed the FAC only pled violations of future contracts, leaving unchallenged the FAC's allegations of the *existing* contract. Judgment on the pleadings is wholly improper where a claim may be based on alternative grounds that are properly pleaded. (*Fire Ins. Exch. v. Sup.Ct. (Altman)* (2004) 116 Cal.App.4th 446, 451-452.)

B. The City's "Harmonizing" Arguments Do Not Support Dismissal as a Matter of Law and, Further, the City Presumes Charter Provisions Trump the MMBA Duty to Bargain

The City's extended argument that "charter cities have authority to set terms and conditions of employment through [c]harter provisions established by the voters" (MJOP 1 at 6:23-24) is a red herring. So too is its argument that Measure B can be harmonized with the MMBA because what it advances is *not* true harmonization but rather the purported superiority of charter amendments. Regardless, these merits arguments are not a proper reason to dismiss.

---

[4] To the extent the Court believes the Seventh Cause of Action should specifically plead that Section 1514-A itself separately violates the MMBA, SJPOA proposes to amend the FAC to add an additional sentence so alleging. Specifically, "107. Section 1514-A of Measure B violates the MMBA because it directs that the City shall unilaterally reduce salaries by as much as 16% if the VEP is 'illegal, invalid or unenforceable as to Current Employees,' without requiring the City to bargain over such reductions and/or even if bargaining were to take place it makes the amount of salary reductions non-negotiable."

First, the gravamen of the MMBA cause of action is that the City, through Measure B, violated its statutory duty to meet and confer and to bargain to impasse before unilaterally reducing employee salaries under the existing MOA, and further that Measure B would make any meet and confer meaningless as to future contacts. (FAC ¶¶ 105-106.)

Second, the City overstates the power of charter cities. For example, although it is generally true that the compensation of charter city employees is a municipal function (MJOP 1 at 7:2-13), once that compensation is fixed as part of an existing ratified collective bargaining agreement, it is binding and enforceable and cannot be unilaterally changed by a charter city without violating the MMBA. (*Glendale City Employees' Assn., Inc. v. City of Glendale* (1975) 15 Cal.3d 328, 344.) Indeed, the California Supreme Court has repeatedly recognized that a charter city cannot use local procedures—including those in charter amendments—to frustrate the MMBA meet and confer requirement. Thus, although salaries are a municipal affair, "the process by which salaries are fixed is obviously a matter of statewide concern and none could, at this late stage, argue that a charter city need not meet and confer concerning its salary structure." (*People ex rel. Seal Beach Police Officers Association v. City of Seal Beach ("Seal Beach")* (1984) 36 Cal.3d 591, 600, fn. 11; see also *id.* at p. 600 [collecting cases establishing that "in an unbroken series of public employee cases," Supreme Court has held that MMBA "prevails over local enactments of a chartered city, even in regard to matters which would otherwise be … strictly municipal affairs"].)

Although the City goes on at great length about harmonizing, what it advances is *not* true harmonization that gives effect and meaning to ***both*** the MMBA and charter sections. Instead, its view of harmonization is to give full effect to Measure B but not to the MMBA, i.e., it essentially argues that Measure B trumps the City's MMBA bargaining obligation. But the Supreme Court explained in *Pacific Legal Foundation v. Brown* (1981) 29 Cal.3d 168, 197 that when statutes are harmonized "reasonable and full effect" is given to *both* state collective bargaining laws (such as the MMBA) and city charters. (Accord *Building Material & Construction Teamsters' Union v. Farrell* (1986) 41 Cal.3d

651, 667.) And *Los Angeles County Civil Service Commission v. Sup. Court* (1978) 23 Cal.3d 55, 62 expressly held that to satisfy the MMBA "[t]he public agency *must fully consider* union presentations; it is not at liberty to grant only a perfunctory review"—that is, the meet and confer must be meaningful for the MMBA to have full effect. (italics added.)

The FAC alleges facts that Sections 1506-A, 1512-A, and 1514-A eliminate the City's meaningful engagement in the meet and confer process (FAC ¶¶ 60, 103-105), which must be deemed true at this stage. (*Lyons, supra,* 24 Cal.4th at pp. 515-516; Code of Civ. Proc. § 438(d)) And at least one of the City's cited cases recognizes that, despite the desirability of harmonization, the cases "are divided on the extent to which the meet and confer provisions [] are compatible with the powers of government agencies to take actions that directly affect the hours, wages, or other working conditions of their employees." (*Farrell, supra,* 41 Cal.3d at p. 666.)

There can be no dispute that the absence of meaningful engagement in the meet and confer process is an MMBA violation. (See *Los Angeles County Civil Service Commission, supra,* at 23 Cal.3d p. 62.) The City's cases do not hold otherwise. For example, *Farrell* held that a charter section giving the city the ability to reclassify employees could be harmonized with the MMBA *because* the meet and confer was meaningful since it would take place ***before*** any reclassification was completed. (41 Cal. 3d at pp. 665-666 [noting charter section was harmonious with MMBA because city would "meet and confer *before* reclassifying positions"; further noting city would "meet . . . and confer about reclassifications *before* the changes are implemented"] [italics added].) That is a far cry from Measure B which affords the City no similar discretion and instead directs it to cut existing and future salaries by 16%, directs existing and future salary cuts to pay to pay for the same level of retirement care, and prohibits any increases to future retirement benefits. (FAC ¶¶ 60, 103-106.) And *San Francisco v. Cooper* (1975) 13 Cal.3d 898, 906 involved a prevailing wage formula that still accorded the city flexibility in the meet and confer process. Indeed, *Cooper* (at pp. 921-922) examined

whether an MMBA-negotiated salary increase met those standards.[5] The City's cases thus say *nothing* about a charter city's ability to breach an existing contract or to take certain subjects outside the scope of bargaining by effectively removing all municipal discretion.

The City's voter ratification theory based on *United Public Employees v. San Francisco* (1987) 190 Cal.App.3d 419 is not dispositive or grounds for dismissal. Specifically, the City argues that case definitively approved charter-based voter approval requirements despite the deleterious effect on the MMBA's meet and confer obligation. But, as the City itself acknowledges, *UPE* is questionable precedent because the California Supreme Court severely criticized its reasoning in *Voters for Responsible Retirement v. Board of Supervisors of Trinity County* ("*Trinity County*") (1994) 8 Cal.4th 765.

Trinity County found that the court of appeal in *UPE* "understated the problematic nature of the relationship between the MMBA and the local referendum power . . . . [T]he purpose of the MMBA is more than promoting communication . . . . Its aim is also to resolve disputes regarding wages, hours, and other terms and conditions of employment . . . *through the negotiation of binding agreements*." (*Id.* at p. 782, italics added.) The reason for that is because "the effectiveness of the collective bargaining process under the MMBA rests in large part upon the fact that the public body that approves the MOU . . . is the same entity that . . . is mandated to conduct or supervise the negotiations from which the MOU emerges. If the referendum power were interjected into this process, then the power to negotiate an agreement and the ultimate power to approve an agreement would be wholly divorced from each other, with the result that at

---

[5] The City also cites *Cooper* to imply that the MMBA does not "supplant" city charters. (MJOP 1 at 7:23-25; see also *id.* at 8:25-28 [citing *San Francisco v. United Assn. of Journeymen* (1986) 42 Cal.3d 810, 816 fn.5 (similar)].) But the Supreme Court expressly held in *Seal Beach* that the MMBA does *not* allow local laws to trump if they violate the MMBA. (*Seal Beach* at p. 597 ["Ambiguous language in section 3500 which seemingly leaves room for local legislation inconsistent with MMBA, has not been so interpreted . . . . [W]e cannot attribute to [the Legislature] an intention to permit local entitles to adopt regulations which would frustrate the declared policies and purposes of the MMB[A]"].) That holding controls over the stray dicta in *Cooper* and *Journeymen*.

the bargaining process established by the MMBA could be undermined. This kind of bifurcation of authority . . . would not be considered lawful . . . in the realm of private sector labor relations." (*Id.*)[6]

While *Trinity County* stopped short of overruling *UPE* (because the former did not involve charter cities), there is no question it fatally undermined *UPE*'s reasoning. Rather than recognizing any "special status of charter cities" (MJOP 1 at 10:1), *Trinity County* actually confirms that charter provisions like Measure B that limit the discretion of government employers and subject collective bargaining agreements to the uncertainties of the referendum process do not give full effect to the MMBA's meet and confer obligation.[7]

Moreover, even if *UPE* is still viable precedent even after the California Supreme Court's criticism, *UPE* itself contemplates reservation of voter approval *after* the meet and confer process was completed. (190 Cal.App.3d at p. 426 [charter section at issue required "electorate to approve . . . any agreement that might be reached" after meet and confer process].) The FAC alleges that Section 1506-A (and by extension Section 1514-A) *a priori* eliminates that meet and confer process and dictates what the end result will be regardless of any bargaining—i.e., salary cuts of up to 16%. (FAC ¶¶ 60, 103,

---

[6] *Trinity County* noted the deleterious consequences voter referendums have on the meet and confer process:

> "If the power of referendum [is given effect], then the Legislature would in effect be sanctioning a kind of bad faith bargaining process in which those who possess the ultimate reservation of rights to approve the [MOA]—i.e., the electorate—are completely absent from the negotiating table. [/p] We presume the Legislature did not intend to compel local governmental entities to engage in a bargaining process that, unless the voters agreed, *could not* lead to a binding agreement even if the employer and employees desired to do so." (*Id.*)

[7] The City further argues that allowing the MMBA claim to survive "would upend . . . established practice" because other charter cities have placed employment terms in charters. (MJOP 1 at 10-11.) But the City cites no judicially-noticeable fact to support that assertion. Nor is it relevant given the FAC's allegations regarding *this* charter amendment. Moreover, as *Farrell* recognized, true harmonization of charters and the MMBA is not always possible.

105.) Thus, far from "harmonizing" with the MMBA, Measure B would thus obliterate the MMBA's duty to meet and confer in good faith.

Indeed, the City has its "voter ratification" theory back-to-front. Ratification could, for example, require city voters to approve a benefit *after* it was negotiated but *before* it went into effect. (But see *Trinity County, supra,* 8 Cal.4th at p. 782.) But the FAC alleges that Sections 1506-A and 1514-A have already, impermissibly, effectuated a change in salary benefits and dictated the amount while the current MOA is in effect and before any bargaining on future salary and benefits. Further, if the MMBA claim is dismissed, this would undermine SJPOA's ability to bargain future salary and benefit levels for its members because of the potential that at any time, if it is successful in this litigation, its members could see a 16% salary reduction. That means that because of the upcoming expiration of the current MOA (on June 30, 2013), as SJPOA tries to negotiate in good faith over wages, hanging over such negotiations is Measure B's threat of severe and *non-negotiable* salary reductions subject to unilateral implementation by the City at any time within the potential life of a new MOA. SJPOA could otherwise be willing to negotiate certain concessions to the City; however, Measure B purports to give the City the unilateral power to wipe out any such favorable adjustments, in derogation of its MMBA duties to meet and confer in good faith.

C. The FAC Alleges the City Has Not Fulfilled Its Meet and Confer Obligations as to Measure B Because the City Has a Continuing Duty to Meet and Confer Every Time It Purports to Implement Measure B to Change SJPOA Members' Working Conditions

The City insists its purported compliance with MMBA meet and confer requirements before putting Measure B on the ballot—which as the City acknowledges is challenged by SJPOA in a separate *quo warranto action*—also constitutes compliance with its meet and confer duties for *any* future implementation of any part of Measure B. But any future reduction in employee salary under the purported authority of Measure B must itself be subject to ***continuing*** meet and confer requirements before being implemented. (See Gov. Code § 3505; *Seal Beach, supra,* 36 Cal.3d at pp. 596-597

[section 3505 requires City to meet and confer in good faith with employee representatives prior to making any unilateral change in the level of wages or benefits].) And the FAC specifically pleads the City has failed to bargain to impasse before implementing Measure B. (FAC ¶ 104.)

Thus, for example, if a county sought voter approval to create a department of corrections separate and apart from its sheriff's office (as Santa Clara County did in 1987), it would have meet and confer obligations with employee unions prior to putting such a measure before the voters. But the county would still have to meet and confer with its employees subsequent to passage if it sought to implement any feature of what the voters enacted if said feature changed working conditions of its employees. (See Gov. Code § 3505.) The same holds true for the City if it ever implements Sections 1506-A, 1512-A, and 1514-A because these clauses effectuate changes in employee working conditions.

D. The Quo Warranto Proceeding Is Unrelated and Not a Proper Basis for Judgment on the Pleadings

The FAC does *not* allege an MMBA violation based on the City's placing of Measure B on the ballot. (See Part IV.A, *supra*.) As the City acknowledges, that challenge is before the Attorney General in a *quo warranto* application. And that separate proceeding is an improper basis to dismiss the Seventh Cause of Action given the different subject matter and that the *quo warranto* filings and supporting documents are inadmissible to attack the FAC. (See SJPOA's Objections to City's RJN 1.)[8]

* * *

The FAC's allegations are sufficient to survive dismissal, but plaintiff respectfully requests leave to amend to the extent the Court finds any deficiency.

---

[8] Although the FAC somewhat inartfully distinguishes between "procedural and substantive" violations of the MMBA (FAC ¶¶ 105-106), its core challenge is that Measure B constitutes unilateral action on mandatory subjects of bargaining through which the City ignored its statutory meet and confer obligation and, further, that even if bargaining were to take place it would be meaningless. To that extent, the FAC's challenge is "procedural" in so far as it is directed at Measure B's infringement on the MMBA's meet and confer *process*. But it is *not* "procedural" in the manner urged by the City—i.e., the FAC does *not* challenge the manner in which Measure B was put on the ballot.

V. CONCLUSION

For all these reasons, the City's motion should be denied in its entirety. To the extent the Court is inclined to dismiss, SJPOA requests leave to amend.

Dated: January 15, 2013

CARROLL, BURDICK & McDONOUGH LLP

By _____
Gregg McLean Adam
Attorneys for Plaintiff
San Jose Police Officers' Association

Gregg McLean Adam, No. 203436
Jonathan Yank, No. 215495
Gonzalo C. Martinez, No. 231724
Amber L. West, No. 245002
CARROLL, BURDICK & McDONOUGH LLP
Attorneys at Law
44 Montgomery Street, Suite 400
San Francisco, CA 94104
Telephone: 415.989.5900
Facsimile: 415.989.0932
Email: gadam@cbmlaw.com

Attorneys for Plaintiff
San Jose Police Officers' Association

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SANTA CLARA

SAN JOSE POLICE OFFICERS' ASSOCIATION,

Plaintiff,

v.

CITY OF SAN JOSE, BOARD OF ADMINISTRATION FOR POLICE AND FIRE DEPARTMENT RETIREMENT PLAN OF CITY OF SAN JOSE, and DOES 1-10, inclusive,

Defendants.

AND ACTIONS CONSOLIDATED FOR PRETRIAL PURPOSES

CITY OF SAN JOSE,

Cross-Complainant,

v.

SAN JOSE POLICE OFFICERS' ASSOCIATION, *et al.*

Cross-Defendants.

No. 1-12-CV-225926
(and Consolidated Actions 1-12-CV-225928, 1-12-CV-226570, 1-12-CV-226574, and 1-12-CV-227864)

PLAINTIFF SAN JOSE POLICE OFFICERS' ASSOCIATION'S OBJECTIONS AND/OR MOTION TO STRIKE THE REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF THE MOTION FOR JUDGMENT ON THE PLEADINGS FOR VIOLATION OF SEVENTH CAUSE OF ACTION

Date: January 29, 2013
Time: 9:00 a.m.
Dept. 2

Complaint Filed: June 6, 2012
Trial Date: None Set

BY FAX

Plaintiff San Jose Police Officers' Association ("SJPOA") hereby objects and moves to strike Defendant City of San Jose's ("the City's) Request For Judicial Notice ("RJN"), filed in support of the City's Motion for Judgment on the Pleadings on SJPOA's Seventh Cause of Action, violation of the Meyers-Milias-Brown Act ("MMBA"). That motion ("MJOP 1") and its RJN—the first of two the City filed against SJPOA—were filed on November 28, 2012. The City attempts to obtain dismissal with arguments that are meritless, including, *inter alia*, that SJPOA purportedly admitted its MMBA claim cannot be litigated in this Court and can only be litigated in a *quo warranto* action. Exs. B-F would not be admissible as "admissions" to contradict the FAC's allegations. (*Gerawan Farming, Inc. v. Lyons* (2000) 24 Cal.4th 468, 515-16 [allegations in the FAC are deemed true and liberally construed].) The City attempts to put these documents before this Court by stretching the boundaries of judicial notice. It should not be allowed to do so.

Specifically, the City seeks judicial notice of certain documents lodged (and *not* filed[1]) by the parties with the Attorney General in SJPOA's pending *quo warranto* application. Judicial notice should not be granted because those documents are irrelevant to any matter before this Court, because they are inadmissible to attack the First Amended Complaint ("FAC") on a motion for judgment on the pleadings, and because the meaning of any statements in the exhibits is disputed. Therefore, the Court should deny the City's Request for Judicial Notice as to Exhibits B through F.[2]

I. RJN EXHIBITS B THROUGH F ARE NOT JUDICIALLY-NOTICEABLE BECAUSE THEY ARE NOT RELEVANT TO ANY ISSUE BEFORE THIS COURT

This Court has discretion to deny judicial notice based on irrelevance alone. (*E.g.*, *Stockton Citizens for Sensible Planning v. City of Stockton* (2012) 210 Cal.App.4th 1484, 1488 n.3 [denying judicial notice of city resolutions because "irrelevant"].) The

---

[1] Exs. F-G were not "filed" with the Attorney General, are not documents created by the Attorney General, and hence Evidence Code §§ 451, 452(b)-(d) do not apply.

[2] The City does not cite *any* authority allowing judicial notice of Exhibit F. Therefore, the Court should deny the request as to Exhibit F on this reason alone.

City does not explain why Exhibits B-F are relevant, but apparently it seeks judicial notice of these documents to further its argument that the MMBA cause of action should be dismissed in favor of the pending *quo warranto* application. (See MJOP 1 at 13-14.) But the FAC and the *quo warranto* application do not involve the same subject matter. The *quo warranto* application seeks permission from the Attorney General to sue based on the City's failure to exhaust its MMBA meet and confer obligations before placing Measure B on the ballot. By contrast, the FAC does *not* allege an MMBA violation based on the City's placing of Measure B on the ballot and instead alleges Measure B *itself* violates the City's MMBA duty to meet and confer in good faith as to the *existing* contract and as to *future* collective bargaining negotiations. (See SJPOA Opp. City's MJOP 1 at Part IV.A.) For that reason, the *quo warranto* application has no bearing on whether the Seventh Cause of Action should be dismissed. Judicial notice is thus improper.

II. JUDICIAL NOTICE OF EXHIBITS B THROUGH F IS IMPROPER BECAUSE THEY DO NOT INVOLVE READILY-VERIFIABLE AND UNDISPUTED FACTS

The only basis the City advances for judicial notice is Evidence Code § 452(h), but that does not apply here or support judicial notice. The California Supreme Court has drawn a clear line against this kind of misuse of section 452(h):

> Judicial notice under Evidence Code section 452, subdivision (h) is intended to cover ***facts which are not reasonably subject to dispute and are easily verified***. These include, for example, facts which are widely accepted as established by experts and specialists in the natural, physical, and social sciences which can be verified by reference to ***treatises, encyclopedias, almanacs and the like*** or by persons learned in the subject matter.

(*People v. Jones* (1997) 15 Cal.4th 119, 172 *overruled on other grounds* in *People v. Hill* (1998) 17 Cal.4th 800 [emphases added].) The City nowhere explains how the parties' submissions to the Attorney General satisfy this standard. It cannot because the parties' submissions are *not* akin to "treatises, encyclopedias, almanacs and the like" and involve disputed facts. (*Id.*)[3]

[3] The sole case cited by the City is inapposite, because it pertained to judicial notice of *legally operative* documents such as recorded real property records and deeds of trust. (*See Fontenot v. Wells Fargo Bank, N.A.* (2011) 198 Cal.App.4th 256.)

Indeed, the City improperly asks this Court to take judicial notice of *disputed* facts contained within Exhibits B-F. (*Gould v. Maryland Sound Industries, Inc.* (1995) 31 Cal.App.4th 1137, 1145-46 ["a court cannot simply look at a piece of paper and conclude as a matter of law" the truth of its contents]; *People v. Tuilaepa* (1992) 4 Cal.4th 569 [disputed facts in juror declarations not subject to judicial notice].) Strictly speaking, courts take judicial notice of facts, not documents. (*Fontenot, supra,* 198 Cal.App.4th at p. 265.) For example, the City seeks judicial notice of the truth of the contents of Exhibits B-F including a purported "admission" by SJPOA. (*See* MJOP 1 at 14:4, 14:7 [claiming that SJPOA has admitted that any procedural challenge to the MMBA must be brought in a *quo warranto* action, citing Ex. F].) But, "[t]aking judicial notice of a document is not the same as accepting the truth of its contents or accepting a particular interpretation of its meaning." (*Fremont Indem. Co. v. Fremont Gen. Corp.* (2007) 148 Cal.App.4th 97, 113; *TSMC North America v. Semiconductor Mfg. Intern. Corp.* (2008) 161 Cal.App.4th 581, 594 n.4 [discovery responses not a proper matter for judicial notice]; *Sosinsky v. Grant* (1992) 6 Cal.App.4th 1548, 1565 [trial court properly refused to notice of the truth of the factual assertions contained in court documents because they were matters of dispute].) That is, judicial notice is inappropriate because the City argues the statements in, *e.g.*, Exhibit F have a certain meaning and effect and therefore the Court should dismiss the MMBA claim. (*See* MJOP 1 at 14:11-13.) That is improper.

III. CONCLUSION

For all these reasons, the City's request for judicial notice of Exhibits B through F should be denied.

Dated: January 15, 2013

CARROLL, BURDICK & McDONOUGH LLP

By _____
Gregg McLean Adam
Attorneys for Plaintiff
San Jose Police Officers' Association

Arthur A. Hartinger (SBN: 121521)
ahartinger@meyersnave.com
Linda M. Ross (SBN: 133874)
lross@meyersnave.com
Jennifer L. Nock (SBN: 160663)
jnock@meyersnave.com
Michael C. Hughes (SBN: 215694)
mhughes@meyersnave.com
MEYERS, NAVE, RIBACK, SILVER & WILSON
555 12th Street, Suite 1500
Oakland, California 94607
Telephone: (510) 808-2000
Facsimile: (510) 444-1108

Attorneys for Defendant
City of San Jose

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SANTA CLARA

SAN JOSE POLICE OFFICERS' ASSOCIATION, Plaintiff, v. CITY OF SAN JOSE, BOARD OF ADMINISTRATION FOR POLICE AND FIRE RETIREMENT PLAN OF CITY OF SAN JOSE, and DOES 1-10 inclusive. Defendants, AND RELATED CROSS-COMPLAINT AND CONSOLIDATED ACTIONS	**Case No. 1-12-CV-225926** *[Consolidated with Case Nos. 112CV225928, 112CV226570, 112CV226574, 112CV227864]* *Assigned for all purposes to the Honorable Peter H. Kirwan* **REPLY MEMORANDUM BY CITY OF SAN JOSE IN SUPPORT OF ITS MOTION FOR JUDGMENT ON THE PLEADINGS AS TO THE SAN JOSE POLICE OFFICERS' ASSOCIATION'S SEVENTH CAUSE OF ACTION FOR VIOLATION OF THE MEYERS-MILIAS-BROWN ACT** Date: January 29, 2013 Time: 9:00 a.m. Courtroom: 8 Complaint Filed: June 6, 2012 Trial Date: None Set

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

The City of San Jose ("the City" or "San Jose") submits this reply memorandum in support of its motion for judgment on the pleadings as to the Seventh Cause of Action brought by the San Jose Police Officers' Association ("SJPOA") for violation of the Meyers-Milias-Brown Act ("MMBA").

I. ARGUMENT

A. Introduction

The SJPOA's Seventh Cause of Action for violation of the MMBA includes claims for "substantive" and "procedural" violations of the MMBA based on Measure B's requirements, now part of the City Charter, that employees pay increased contributions towards pension and retiree health benefits.

The City's opening brief established that the MMBA includes no "substantive" requirements, but only "procedural" requirements, and the SJPOA does not contend otherwise.

The City's opening brief also established that decades of California Supreme Court precedent holds that, to satisfy the MMBA's "procedural" requirements, a charter city like San Jose needs only to meet and confer with employee unions before placing on the ballot a measure that affects terms and conditions of employment.

In response, the SJPOA makes two contentions. First, it argues that the MMBA is violated because Measure B breaches the SJPOA's existing contract with the City (due to expire on June 30, 2013). Second, it argues that the MMBA is violated because "it will make any meet and confer meaningless as to future contracts." (SJPOA Opp. at 1:10-11.)

As to the SJPOA's first contention, the Seventh Cause of Action neither refers to the SJPOA's current contract nor claims that the City has actually implemented Measure B (which it has not) in derogation of its contract. But even if the City had, the remedy for breach of contract is not a MMBA claim in superior court, but a contractual remedy – here the filing of a grievance and, ultimately, contractual arbitration. The SJPOA does not cite any case giving it a remedy under the MMBA for breach of contract.

As to the SJPOA's second contention, decades of California Supreme Court decisions hold that the MMBA requires only that a charter city like San Jose meet and confer prior to placing on

the ballot a measure that affects terms and conditions of employment. The SJPOA's brief proposes a different rule – that the City and union must first agree before the City places a measure on the ballot for consideration by the voters. But that is not the law. As explained by the California Supreme Court in *Seal Beach*, "the governing body of the agency – here the city council – retains the ultimate power to refuse an agreement and make its own decision," which preserves the council's rights under the California constitution "to propose a charter amendment if the meet and confer process does not persuade it otherwise." *The People ex rel. Seal Beach Police Officers Ass'n*, 36 Cal. 3d 591, 601 (1984). The MMBA requires a public entity only to meet and confer; it does not require a public entity to come to an agreement with labor unions.

To the extent the SJPOA claims that the City will fail to meet and confer with it in the future over new proposals made by the SJPOA, that claim is not ripe. The SJPOA has not plead any allegations that the SJPOA has sought to meet and confer and been denied by the City.

In summary, the only possible MMBA claim would be a claim that the City failed to adequately meet and confer *before* placing Measure B on the ballot. But the SJPOA admits, as it must, that this claim can be made only in a *quo warranto* action. For this reason, the SJPOA's Seventh Cause of Action for violation of the MMBA must be dismissed with prejudice.

B. <u>The SJPOA Does Not and Cannot Plead Facts Demonstrating a Breach of Its Current Contract with the City but, even if It Did, the Proper Remedy Is Contractual Arbitration, Not an MMBA Claim In Superior Court.</u>

The SJPOA contends that its MMBA claim includes the contention that Measure B violates its *current* contract with the City. The SJPOA Complaint does not and cannot claim that the City has implemented Measure B in violation of the SJPOA's current contract. But even if the City had imposed Measure B, the proper remedy is not an MMBA claim in Superior Court, but a contractual remedy – here, the filing of a grievance and, ultimately, arbitration. These contractual remedies are exclusive. *Service Employees International Union, Local 1000 v. Dept. of Personnel Admin.*, 142 Cal. App. 4th 866, 870 (2006). Indeed, the SJPOA cites no authority to support its novel claim that breach of a union agreement, with an arbitration clause, can be brought as an MMBA claim in the Superior Court.

///

1. The POA Fails to Allege Any Facts Showing that the City Has Breached Its MOA.

The POA's claim that the City breached the MOA must be rejected because the POA has not alleged *any* facts supporting it.

First, while the POA argues that the current MOA has been violated by sections 1506-A, 1512-A, and 1514-A of Measure B (FAC at ¶¶105, 106; Opp. at 1 n.2), its FAC does not (and cannot) allege that any of these sections has been implemented. In fact, *none* of them has been, and the POA's MOA will expire on June 30, 2013. (Opp. at 9:12.) Furthermore, in its FAC, the POA did not allege that its members have suffered any contract damages to date, and instead only alleged that its members "will" suffer damages. (FAC at ¶102.)

Second, in its reply, the POA fails to identify which MOA provisions have been violated by Measure B. The FAC includes only cursory legal conclusions that, "[t]he City has breached the MOA by the actions and omissions alleged above." (FAC at ¶100.) It fails to allege any material facts showing a breach. In ruling on a challenge to a complaint, courts "do not...assume the truth of contentions, deductions or *conclusions of fact or law*." *Moore v. Regents of the University of California*, 51 Cal. 3d 120, 125 (1990) (emphasis added). The POA's cursory conclusion of law cannot withstand the City's motion.

2. The POA Has Failed to Allege Exhaustion of Its MOA Grievance and Arbitration Mechanism.

Even if the POA had properly alleged facts supporting a breach of its current MOA, its MMBA claim still fails because the POA has not -- and cannot -- allege that it exhausted its MOA grievance and arbitration mechanism.

> It is the general rule that a party to a collective bargaining contract which provides grievance and arbitration machinery for the settlement of disputes within the scope of such contract must exhaust these internal remedies before resorting to the courts in the absence of facts which would excuse him from pursuing such remedies.

Charles J. Rounds Co. v. Joint Council of Teamsters No. 42, 4 Cal. 3d 888, 894 (1971); *Service Employees International Union, Local 1000 v. Dept. of Personnel Admin.*, 142 Cal. App. 4th 866, 870 (2006) ("As a matter of public policy, contractual arbitration remains a highly favored means of dispute resolution even for public sector collective bargaining units.").

Here, the POA's MOA with the City contains a grievance process that culminates in binding arbitration. (City's Reply Request for Judicial Notice ("Reply RJN"), Exh. A (MOA, Art. 25).) As a result, the POA *must* allege exhaustion of the arbitration mechanism in order to bring a breach of contract cause of action (or an MMBA claim premised on a breach of contract). Because the POA has not and cannot allege exhaustion, its MMBA claim must fail.

C. The California Supreme Court Has Squarely Held that the MMBA Requires Only that Charter Cities Meet and Confer Before Placing a Charter Measure on the Ballot; The SJPOA'S "Harmonization" Theory – that the City and Union Must First Reach Agreement - Is Contrary to Established Law.

The SJPOA's second contention is that Measure B violates the MMBA by depriving the SJPOA of the opportunity to bargain in the future over requirements that employees make certain contributions to pensions and retiree health care benefits.

The City's opening brief relies on Supreme Court decisions that harmonized (1) the authority of charter cities over compensation of their employees with (2) the MMBA's requirement for meet and confer before changing terms and conditions of employment. Beginning with *Seal Beach, supra*, the Supreme Court has held that the two are harmonized by the requirement that, before placing a charter amendment on the ballot for voter decision, the City must meet and confer with employee organizations.

The SJPOA disagrees with this principle and asks the Court to make new law by adopting an alternative principle: that the parties must come to an agreement before the matter is placed on the ballot. This is not the law and none of the cases cited by the SJPOA support it.

1. The Case Law Cited by the SJPOA Does Not Undercut and in Fact Supports the City's Position that the MMBA Requires Only that a Charter City Meet and Confer Before Placing a Matter on the Ballot.

None of the case law cited by the SJPOA contradicts the City's position.

The SJPOA cites *Glendale City Employees' Ass'n Inc. v. City of Glendale*, 15 Cal. 3d 328, 344 (1975) for the proposition that charter cities are bound by an existing ratified collective bargaining agreement. The City has no quarrel with this proposition, but *Glendale* says nothing about the interplay between the MMBA and the authority of charter cities to place measures on the ballot for consideration of the electorate.

The SJPOA quotes passages from *Seal Beach* to contend that a charter city must meet and confer over its salary structure. Again, the City has no quarrel with this statement, but as discussed at length in the City's opening brief, *Seal Beach* held that the MMBA was satisfied when a charter city met and conferred before placing a matter on the ballot. *Seal Beach* supports the City's position. (City's Reply at 7:26-8:9.) The SJPOA misleadingly relies on a quotation from *Seal Beach* concerning "an unbroken series off public employee cases" in which the MMBA "prevails over local enactments of a charter city." (SJPOA Opp. at p. 5:17-19.) But *Seal Beach*'s full explanation is: "All of these cases involved actual conflicts between state statutes and city 'law.' No such conflict exists between the city council's power to propose charter amendments and Section 3505 [of the MMBA]." *Seal Beach* at p. 601.

Contrary to *Seal Beach*, the SJPOA contends that the City's position "is not true harmonization" because it does not give "reasonable and full effect" to the MMBA. But the cases cited by the SJPOA involve an unrelated issue: whether a public agency has truly engaged in meet and confer or in only "perfunctory review" of a union's proposals. *Los Angeles County Civil Service Comm. v. Superior Court*, 23 Cal. 3d 55, 62 (1978). Again, the City has no quarrel with the requirement that meet and confer be meaningful, but under *Seal Beach*, meaningful meet and confer may be followed by the City placing a matter on the ballot. The SJPOA may disagree with *Seal Beach* and its progeny as to the wisdom of the Supreme Court's "harmonization" but it is binding on this court.

The SJPOA cites to the Supreme Court decision in *Building Material & Construction Teamsters' Union v. Farrell*, 41 Cal. 3d 651 (1986), in support of its argument, based on the fact that, in *Farrell*, meet and confer occurred *before* the city reclassified positions. *Farrell*, which cited *Seal Beach* with approval, does not help the SJPOA. Here, the City is not contending that it had no obligation to meet and confer before placing Measure B on the ballot. The City met and conferred with the SJPOA over Measure B, including the additional pension and health contributions, and the SJPOA does not contend otherwise. Again, the SJPOA misleadingly quotes a passage, this time from *Farrell,* stating that cases "are divided" on the compatibility of meet and confer with public agency actions on terms and conditions of employment. (SJPOA Opp. at 6:9-

14.) But *Farrell* also said: "We note that the majority of cases display a preference for construing local laws to be adaptable to the meet and confer requirements of the MMBA." 41 Cal. 3d at 667.

The SJPOA also cites to *San Francisco v. Cooper*, 13 Cal. 3d 898 (1975) but *Cooper* upheld a prevailing wage formula contained in a city charter, exactly the type of provision that the SJPOA says frustrates future bargaining.

The SJPOA refuses to acknowledge the authority given to charter cities under the state constitution. The SJPOA cites *Voters for Responsible Retirement v. Board of Supervisors of Trinity County*, 8 Cal. 4th 765 (1994), for the proposition that the MMBA requires all terms and conditions of employment to be negotiated through binding agreements with the governing body. But as demonstrated in the City's opening brief, *Trinity County* in fact highlights the special nature of charter cities. The Court in *Trinity County* relied on a Government Code section applicable only to counties, and was extremely careful to state that its decision did not apply to cities or a chartered city and county. *Trinity County*, 8 Cal. 4th at 782 nn.4 & 5. This case does not involve a voter referendum over an existing agreement, but rather a decision by the City to exercise its constitutional authority to place a charter amendment on the ballot. It is governed by *Seal Beach*, and the Court in *Trinity County* said nothing to undermine its prior decisions in *Coop*er, *Seal Beach,* and *Farrell.*

2. The SJPOA's Argument on How to Harmonize the MMBA and City Charter Authority Is Contrary to the Law and Unworkable.

The SJPOA argues that the proper way to harmonize charter city status and the MMBA would be to give voters an opportunity to approve a benefit change only after it had been negotiated by the City but before it went into effect. This suggestion is contrary to both the MMBA and the holding and the rationale of *Seal Beach.*

Under the MMBA, no public employer, including a charter city, is obligated to come to an agreement with an employee union over terms and conditions of employment. Under the MMBA, after meeting and conferring, and if no agreement is reached, the governing body has the authority to legislatively implement its last, best, and final offer. Cal. Gov. Code § 3505.7. "[A]lthough the

///

MMBA mandates bargaining about certain matters, public agencies retain the ultimate power to refuse to agree on any particular issue." *Farrell* at p. 666.

In *Seal Beach*, the Court expressly recognized that under the MMBA, the city council retained the authority to "refuse an agreement and make its own decision." *Seal Beach*, *supra*, 36 Cal. 3d 591, 601. And the Court further recognized that this retention of authority preserved the council's right to "propose a charter amendment if the meet and confer process does not persuade it otherwise." *Ibid.* Intrinsic to the MMBA is the right of the governing body not to agree, and intrinsic to charter city authority is the right of the governing body to place charter amendments on the ballot.

Moreover, the SJPOA's "harmonization" principal is wholly unworkable because public employees are typically organized into multiple bargaining units with different agendas, making it unlikely for a city to obtain agreement with all unions before placing a measure on the ballot. For example, in San Jose there are eleven different employee labor unions.

Finally, the SJPOA complains that Measure B is a violation of the MMBA because it undermines the SJPOA's ability to bargain future salary and benefits, limiting the options for future agreements. But as explained in *United Public Employees v. City and County of San Francisco*, 190 Cal.App.3d 419, 425-26 (1987) (which as explained above was not overruled by *Trinity County* and is therefore still good law), the SJPOA may still bargain over future salary and benefits, with the only proviso being that if a charter change is involved, the change must be submitted to the voters.

The SJPOA is essentially proposing a rule that would prohibit the electorate of charter cities (of which there are over 80 in California) from asserting control over public employee retirement benefits unless labor unions first agreed. Such a rule would have a sweeping effect in California where voters in many charter cities, not limited to San Jose, have placed limits on employee pensions and benefits in their city charters, including the contributions required by the city and employees to fund those benefits.

A sample of charter cities that include provisions on employee and city contributions to pensions and other benefits in their charters include:

San Diego. San Diego Charter Section 143 states: "The City shall contribute annually an amount substantially equal to that required of the employees for normal retirement allowances, as certified by the actuary, but shall not be required to contribute in excess of that amount." (Reply RJN, Exh. E.)

Oakland. Oakland Charter Article XX (Oakland Municipal Retirees' Retirement System), Section 2005 ("Member and City contributions") states that "Members normal rates of contributions shall be changed by the Board on the basis of periodical actuarial valuation and investigation provided by the Charter." (Reply RJN, Exh. F.)

San Francisco. The San Francisco Charter requires employees to make contributions of 7% of their salaries towards their pensions, and to contribute up to an additional 6% when the City contribution rate rises to over 12% of City payroll. (Reply RJN, Exh. G (San Francisco Charter §§ A8.587-8(c), A8.597-11(e), A8.598-11(e).) The Charter requires employees hired on or before January 2009 to contribute up to 1% of their salaries towards retiree health care, with a matching contribution by the City, and employees hired after January 2009 to contribute 2% with the City contributing 1%. (Ibid. (San Francisco Charter § A8.432(a), (b).)

San Jose. Even before Measure B, the San Jose City Charter provided for "minimum benefits" including formulas for employee and City contribution rates. (Reply RJN, Exh. H (San Jose Charter Article XV).)

D. The SJPOA's Contention that the City Will Fail to Meet and Confer in the Future Is Not Ripe, and the Court Must Presume that the City Will Act Lawfully.

The SJPOA contends that San Jose has a continuing obligation to meet and confer before implementing Measure B, but does not complain of any particular failure by the City. Thus this contention is not ripe for adjudication. In making a facial challenge to the constitutionality of an ordinance, plaintiffs "'cannot prevail by suggesting that in some future hypothetical situation constitutional problems may possibly arise as to the particular application of the statute. . . . Rather, petitioners must demonstrate that the act's provisions inevitably pose a present total and fatal conflict with applicable constitutional prohibitions.'" *Tobe v. City of Santa Ana*, 9 Cal. 4th 1069, 1084 (1995), quoting *Arcadia Unified School Dist. v. State Dept. of Education*, 2 Cal. 4th 251, 267

(1992); *PG&E Corp v. Public Utilities Com.*, 118 Cal. App. 4th 1174, 1217 (2009) (where agency had not yet applied challenged interpretation, "the dispute petitioners would like this court to resolve is abstract").

Moreover, the Court cannot presume that the City will not meet any legal obligations it may have. By arguing that Measure B – if implemented prior to June 30, 2013 – will violate its MOA, the POA is mounting a facial challenge to Measure B. But a facial challenge to a legislative act "is, of course, the most difficult challenge to mount successfully, since the challenger must establish that *no set of circumstances exists under which the Act would be valid.*" *Myers, Inc. v. City & County of San Francisco,* 253 F. 3d 461, 467 (2001) (citing *United States v. Salerno*, 481 U.S. 739, 745 (1987)). "The fact that [the Ordinance] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid." *Id.* In fact, "[i]t is also settled that when the terms of a statue or charter may reasonably be interpreted to avoid conflict with a constitutional interpretation, they will be so read." *Building Material & Construction Teamsters' Union v. Farrell*, 41 Cal. 3d 661, 665 (1986).

Thus, not only is the SJPOA's claim about a future violation of the MMBA unripe, but the Court must assume that the City will comply with its legal obligations under the MMBA unless there is "no set of circumstances" under which Measure B and the MMBA are compatible. This is not the case and therefore the SJPOA's Seventh Cause of Action must be dismissed.

II. CONCLUSION

The SJPOA does not properly allege a violation of its *current* contract with the City, but if it did, the remedy would be contractual arbitration, not a claim in Superior Court under the MMBA.

The SJPOA cannot state a claim that Measure B violates its right to bargain in the *future* by placing required contribution rates in the City Charter. Under *Seal Beach* and other California Supreme Court cases, the MMBA requires only that a city meet and confer before placing Measure B on the ballot.

The SJPOA's contrary "harmonization" principal – that the labor unions must agree before a city may place a matter on the ballot – must be rejected as contrary to settled law.

A claim that a charter city failed to meet and confer before placing a measure on the ballot can be brought only in *quo warranto*, and the SJPOA does not argue otherwise. The SJPOA in fact is seeking to bring a *quo warranto* action and awaiting a decision by the Attorney General on whether to permit the action to proceed.

Finally, the SJPOA's claim that the City will refuse to meet and confer when required in the *future* is not ripe and therefore not subject to adjudication.

For these reasons, the SJPOA's Seventh Cause of Action for violation of the MMBA must be dismissed with prejudice.

DATED: January 22, 2013

MEYERS, NAVE, RIBACK, SILVER & WILSON

By: _____

Arthur A. Hartinger
Linda M. Ross
Jennifer L. Nock
Michael C. Hughes
Attorneys for Defendant
City of San Jose

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF ALAMEDA

At the time of service, I was over 18 years of age and **not a party to this action.** I am employed in the County of Alameda, State of California. My business address is 555 12th Street, Suite 1500, Oakland, CA 94607.

On January 22, 2013, I served true copies of the following documents described as:

REPLY MEMORANDUM BY CITY OF SAN JOSE IN SUPPORT OF ITS MOTION FOR JUDGMENT ON THE PLEADINGS AS TO THE SAN JOSE POLICE OFFICERS' ASSOCIATION'S SEVENTH CAUSE OF ACTION FOR VIOLATION OF THE MEYERS-MILIAS-BROWN ACT

on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY OVERNIGHT DELIVERY: I enclosed said document(s) in an envelope or package provided by the overnight service carrier and addressed to the persons at the addresses listed in the Service List. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of the overnight service carrier or delivered such document(s) to a courier or driver authorized by the overnight service carrier to receive documents.

BY E-MAIL OR ELECTRONIC TRANSMISSION: I caused a copy of the document(s) to be sent from e-mail address jfoley@meyersnave.com to the persons at the e-mail addresses listed in the Service List. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on January 22, 2013, at Oakland, California.

JILALA H. FOLEY

SERVICE LIST

John McBride Christopher E. Platten Mark S. Renner WYLIE, MCBRIDE, PLATTEN & RENNER 2125 Canoas Garden Ave, Suite 120 San Jose, CA 95125 E-MAIL: jmcbride@wmprlaw.com cplatten@wmprlaw.com mrenner@wmprlaw.com	Attorneys for Plaintiffs/Petitioners, ROBERT SAPIEN, MARY MCCARTHY, THANH HO, RANDY SEKANY AND KEN HEREDIA (Santa Clara Superior Court Case No. 112CV225928) AND Plaintiffs/Petitioners, JOHN MUKHAR, DALE DAPP, JAMES ATKINS, WILLIAM BUFFINGTON AND KIRK PENNINGTON (Santa Clara Superior Court Case No. 112CV226574) AND Plaintiffs/Petitioners, TERESA HARRIS, JON REGER, MOSES SERRANO (Santa Clara Superior Court Case No. 112CV226570)
Gregg McLean Adam Jonathan Yank Gonzalo Martinez Jennifer Stoughton CARROLL, BURDICK & MCDONOUGH, LLP 44 Montgomery Street, Suite 400 San Francisco, CA 94104 E-MAIL: gadam@cbmlaw.com jyank@cbmlaw.com gmartinez@cbmlaw.com jstoughton@cbmlaw.com awest@cbmlaw.com	Attorneys for Plaintiff, SAN JOSE POLICE OFFICERS' ASSOC. (Santa Clara Superior Court Case No. 112CV225926)
Teague P. Paterson Vishtap M. Soroushian BEESON, TAYER & BODINE, APC Ross House, 2nd Floor 483 Ninth Street Oakland, CA 94607-4051 E-MAIL: tpaterson@beesontayer.com; vsoroushian@beesontayer.com;	Plaintiff, AFSCME LOCAL 101 (Santa Clara Superior Court Case No. 112CV227864)

Harvey L. Leiderman REED SMITH, LLP 101 Second Street, Suite 1800 San Francisco, CA 94105 E-MAIL: hleiderman@reedsmith.com;	Attorneys for Defendant, CITY OF SAN JOSE, BOARD OF ADMINISTRATION FOR POLICE AND FIRE DEPARTMENT RETIREMENT PLAN OF CITY OF SAN JOSE (Santa Clara Superior Court Case No. 112CV225926) AND Necessary Party in Interest, THE BOARD OF ADMINISTRATION FOR THE 1961 SAN JOSE POLICE AND FIRE DEPARTMENT RETIREMENT PLAN (Santa Clara Superior Court Case No. 112CV225928) AND Necessary Party in Interest, THE BOARD OF ADMINISTRATION FOR THE 1975 FEDERATED CITY EMPLOYEES' RETIREMENT PLAN (Santa Clara Superior Court Case Nos. 112CV226570 and 112CV226574) AND Necessary Party in Interest, THE BOARD OF ADMINISTRATION FOR THE FEDERATED CITY EMPLOYEES RETIREMENT PLAN (Santa Clara Superior Court Case No. 112CV227864)

Arthur A. Hartinger (SBN: 121521)
ahartinger@meyersnave.com
Linda M. Ross (SBN: 133874)
lross@meyersnave.com
Jennifer L. Nock (SBN: 160663)
jnock@meyersnave.com
Michael C. Hughes (SBN: 215694)
mhughes@meyersnave.com
MEYERS, NAVE, RIBACK, SILVER & WILSON
555 12th Street, Suite 1500
Oakland, California 94607
Telephone: (510) 808-2000
Facsimile: (510) 444-1108

Attorneys for Defendant
City of San Jose

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SANTA CLARA

SAN JOSE POLICE OFFICERS' ASSOCIATION, Plaintiff, v. CITY OF SAN JOSE, BOARD OF ADMINISTRATION FOR POLICE AND FIRE RETIREMENT PLAN OF CITY OF SAN JOSE, and DOES 1-10 inclusive. Defendants, AND RELATED CROSS-COMPLAINT AND CONSOLIDATED ACTIONS	**Case No. 1-12-CV-225926** *[Consolidated with Case Nos. 112CV225928, 112CV226570, 112CV226574, 112CV227864]* *Assigned for all purposes to the Honorable Peter H. Kirwan* **RESPONSE BY CITY OF SAN JOSE TO SAN JOSE POLICE OFFICERS' ASSOCIATION'S OBJECTIONS TO THE CITY'S REQUEST FOR JUDICIAL NOTICE** Date: January 29, 2013 Time: 9:00 a.m. Department: 8 Complaint Filed: June 6, 2012 Trial Date: None Set

Along with its opposition brief, the SJPOA filed an objection to, and motion to strike, Exhibits B through F of the City's Request for Judicial Notice. Exhibits B through F are the documents related to the SJPOA's June 2012 application to the California Attorney General for leave to file a quo warranto action. Through its proposed quo warranto action, the SJPOA seeks to invalidate Measure B based on the City's alleged failure to adequately meet and confer prior to placing Measure B of the ballot.

In its objection, the SJOPA raises the argument that its own application to the attorney general – in which is admits that a quo warranto action is the only way it can raise a procedural MMBA claim – is irrelevant to the City's challenge to the SJOPA's *non*-quo warranto procedural MMBA claim. This contention should be rejected outright.

The SJOPA also argues that Exhibits B through F and any admissions contained therein are not readily-verifiable and undisputed. On the contrary, the SJOPA has not disputed that Exhibits B through F are its documents; instead, it quibbles with the term "filed" while admitting that it "lodged" them. (SJOPA's Obj. to RJN at 3 n.3.) Critically, in its letter to the Attorney General's Office, the SJOPA's attorney admitted that:

> Santa Clara Superior Court Case No. 1-12-CV225926 was filed by our office on behalf of the SJOPA … [and] does not and cannot … attack the procedural validity of Measure B….

(The City's RJN, Exhibit F.) In other words, the SJPOA admitted that the Seventh Cause of Action in this lawsuit is not challenging the procedural validity of Measure B.

The Court can consider this admission. Judicially noticeable admissions by a plaintiff that contradict facts in a pleading will be considered by a court when ruling on the sufficiency of those pleadings.

> The courts, however, will not close their eyes to situations where a complaint contains . . . allegations contrary to facts which are judicially noticed. … [¶] The court will take judicial notice of records such as admissions, answers to interrogatories, affidavits, and the like, when considering a demurrer, only where they contain statements of the plaintiff or his agent which are inconsistent with the allegations of the pleading before the court.

Del. E. Webb Corp. v. Structural Materials Co., 123 Cal. App. 3d 593, 604-05 (1981).

///

Thus, because (1) the MMBA does not give rise to a substantive claim (only a procedural meet and confer claim) and (2) the SJPOA is pursuing its procedural meet and confer claim in its quo warranto action (as discussed in the City's opening and reply briefs), the SJOPA's non-quo warranto Seventh Cause of Action must be dismissed.

DATED: January 22, 2013

MEYERS, NAVE, RIBACK, SILVER & WILSON

By: _____

Arthur A. Hartinger
Linda M. Ross
Jennifer L. Nock
Michael C. Hughes
Attorneys for Defendant
City of San Jose

2031063.1

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF ALAMEDA

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the County of Alameda, State of California. My business address is 555 12th Street, Suite 1500, Oakland, CA 94607.

On January 22, 2013, I served true copies of the following documents described as:

RESPONSE BY CITY OF SAN JOSE TO SAN JOSE POLICE OFFICERS' ASSOCIATION'S OBJECTIONS TO THE CITY'S REQUEST FOR JUDICIAL NOTICE

on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY OVERNIGHT DELIVERY: I enclosed said document(s) in an envelope or package provided by the overnight service carrier and addressed to the persons at the addresses listed in the Service List. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of the overnight service carrier or delivered such document(s) to a courier or driver authorized by the overnight service carrier to receive documents.

BY E-MAIL OR ELECTRONIC TRANSMISSION: I caused a copy of the document(s) to be sent from e-mail address jfoley@meyersnave.com to the persons at the e-mail addresses listed in the Service List. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on January 22, 2013, at Oakland, California.

JILALA H. FOLEY

SERVICE LIST

John McBride Christopher E. Platten Mark S. Renner WYLIE, MCBRIDE, PLATTEN & RENNER 2125 Canoas Garden Ave, Suite 120 San Jose, CA 95125 E-MAIL: jmcbride@wmprlaw.com cplatten@wmprlaw.com mrenner@wmprlaw.com	Attorneys for Plaintiffs/Petitioners, ROBERT SAPIEN, MARY MCCARTHY, THANH HO, RANDY SEKANY AND KEN HEREDIA (Santa Clara Superior Court Case No. 112CV225928) AND Plaintiffs/Petitioners, JOHN MUKHAR, DALE DAPP, JAMES ATKINS, WILLIAM BUFFINGTON AND KIRK PENNINGTON (Santa Clara Superior Court Case No. 112CV226574) AND Plaintiffs/Petitioners, TERESA HARRIS, JON REGER, MOSES SERRANO (Santa Clara Superior Court Case No. 112CV226570)
Gregg McLean Adam Jonathan Yank Gonzalo Martinez Jennifer Stoughton CARROLL, BURDICK & MCDONOUGH, LLP 44 Montgomery Street, Suite 400 San Francisco, CA 94104 E-MAIL: gadam@cbmlaw.com jyank@cbmlaw.com gmartinez@cbmlaw.com jstoughton@cbmlaw.com awest@cbmlaw.com	Attorneys for Plaintiff, SAN JOSE POLICE OFFICERS' ASSOC. (Santa Clara Superior Court Case No. 112CV225926)
Teague P. Paterson Vishtap M. Soroushian BEESON, TAYER & BODINE, APC Ross House, 2nd Floor 483 Ninth Street Oakland, CA 94607-4051 E-MAIL: tpaterson@beesontayer.com; vsoroushian@beesontayer.com;	Plaintiff, AFSCME LOCAL 101 (Santa Clara Superior Court Case No. 112CV227864)

Harvey L. Leiderman REED SMITH, LLP 101 Second Street, Suite 1800 San Francisco, CA 94105 E-MAIL: hleiderman@reedsmith.com;	Attorneys for Defendant, CITY OF SAN JOSE, BOARD OF ADMINISTRATION FOR POLICE AND FIRE DEPARTMENT RETIREMENT PLAN OF CITY OF SAN JOSE (Santa Clara Superior Court Case No. 112CV225926) AND Necessary Party in Interest, THE BOARD OF ADMINISTRATION FOR THE 1961 SAN JOSE POLICE AND FIRE DEPARTMENT RETIREMENT PLAN (Santa Clara Superior Court Case No. 112CV225928) AND Necessary Party in Interest, THE BOARD OF ADMINISTRATION FOR THE 1975 FEDERATED CITY EMPLOYEES' RETIREMENT PLAN (Santa Clara Superior Court Case Nos. 112CV226570 and 112CV226574) AND Necessary Party in Interest, THE BOARD OF ADMINISTRATION FOR THE FEDERATED CITY EMPLOYEES RETIREMENT PLAN (Santa Clara Superior Court Case No. 112CV227864)

2006323.1

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SANTA CLARA

BEFORE THE HONORABLE PETER H. KIRWAN, JUDGE

DEPARTMENT 8

---oOo---

SAN JOSE POLICE OFFICERS' ASSOCIATION,	)
PLAINTIFF,	) NO. 1-12-CV-225926
-VS-	)
CITY OF SAN JOSE,	)
DEFENDANT.	)

---oOo---

REPORTER'S TRANSCRIPT OF PROCEEDINGS

LAW AND MOTION

JANUARY 29, 2013

---oOo---

A P P E A R A N C E S:

FOR THE PLAINTIFF:	GREGG ADAM Attorney at Law
	VISH SOROUSHIAN Attorney at Law
	TEAGUE PATERSON Attorney at Law
FOR THE DEFENDANTS:	LINDA ROSS Attorney at Law
	HARVEY LEIDERMAN Attorney at Law
	JENNIFER NOCK Attorney at Law
	ARTHUR HARTINGER Attorney at Law
OFFICIAL COURT REPORTER:	MELISSA CRAWFORD, CSR, RPR CSR NO. 12288

San Jose, California January 29, 2013

P R O C E E D I N G S

THE COURT: All right, good morning, everyone. Welcome to Department 8. This our law and motion calendar. I'm going to take a quick minute and explain how we're going to handle the calendar this morning. Some of you have been in here before and appeared on this calendar and are familiar. Some of you haven't. So for the benefit of those of you who haven't been here I will call the matters as they appear on the calendar. When I call your matter I'm going to ask that you step forward and state your full name for the record. For those of you appearing by telephone this morning by court call, I'm going to ask that you state your full name, spell your last name for the benefit of the record. And I'm going to remind you that it's very important you identify yourself before speaking so that there's no confusion on the record as to who is talking.

We do have a busy calendar today. We're limited in time. I've got ten o'clock and eleven o'clock calendars, which means that we're going to have to be efficient with our time this morning. And, so, if you're here to address a tentative ruling, and some of you are here to do that, I'm going to remind you, number one, there's no need to reargue or rehash what's already been set forth in your papers. Those have been reviewed and considered. And it's just not efficient to reargue what's already been put forth in your papers.

If there's a portion of the tentative you want to direct the Court's attention to I certainly encourage you to do that. But I'd ask that when you do that you be brief, to the

point. And I'm going to have to, obviously, manage time as we proceed this morning. All right, let's get right into it.

(Whereupon, the calendar was called in numerical order.)

THE COURT: Line 15 is San Jose Police Officers' Association versus City of San Jose.

MR. ADAM: Good morning, Your Honor. Greg Adam, Carroll, Burdick & McDonough, for the San Jose POA.

MR. SOROUSHIAN: Good morning, Your Honor. Vish Soroushian for plaintiff's as to Local 101.

MS. ROSS: Good morning, Your Honor. Linda Ross, with Meyers, Nave, for the City of San Jose.

THE COURT: Can you state your appearance again? I didn't get that down.

MS. ROSS: Linda Ross, of the law firm Meyers, Nave, for the City of San Jose.

MR. PATERSON: And, Your Honor, Teague Paterson, P-A-T--E-R-S-O-N, appearing on court call for plaintiff's AFSCME Local 101.

MR. LEIDERMAN: Good morning, Your Honor. Harvey Leiderman, L-E-I-D-E-R-M-A-N, of Reed Smith, appearing for defendants and necessary parties in interest, the Board of Administration For the Police and Fire Retirement Plan, and for the Federated City Employees Retirement System.

MS. NOCK: And Jennifer Nock, also of Meyers, Nave, for defendants City of San Jose and Debra Figone in her official capacity as City Manager.

MR. HARTINGER: Also, Your Honor, Arthur Hartinger for

defendant City of San Jose.

THE COURT: Okay. Do we have anyone else appearing telephonically this morning? No? Okay, let me start with by making just a general comment. Unfortunately, as you've seen with this nine o'clock law and motion calendar, we have limited time. This case, obviously there's a lot of issues. And I know everybody wants to be heard. And the reality is we just don't have the luxury of a lot of time to do it. I think for future reference I am going to have to consider, with respect to a case like this, special setting this type of hearing to allow the amount of proper time. I am prepared to make that offer today, or we can proceed forward if everyone wants to do that, okay? I do have ten o'clock and eleven o'clock calendars, and I still have another matter after yours. So my thought would be let's do the best we can today. I'm going to have limited time. And then, with respect to any future motions, we can contemplate special setting those.

MR. ADAM: We agree with that, Your Honor.

MS. ROSS: Yes, Your Honor.

MR. HARTINGER: One question, would we schedule that through your clerk?

THE COURT: Yes. Okay. All right, so without further adieu, and this is on calendar, it's a motion for judgment on the pleadings that's been brought by the San Jose Police Officers' Association. And then there's a second motion that's been for judgment on the pleadings that's been brought by the defendant, the cross complainant, City of San Jose. And these cases, as I understand it, there's five cases that have been

consolidated.

MS. ROSS: That's correct, Your Honor. Linda Ross for the City of San Jose. There are five cases that have been consolidated. Both motions today are brought by City of San Jose.

THE COURT: I misspoke when I said Police Officers' Association. I apologize. Yeah.

MR. ADAM: That's correct. Just to clarify, consolidated for pretrial purposes, the five cases.

THE COURT: Right.

MR. ADAM: That was Judge Lucas's order.

THE COURT: That was Judge Lucas's order. Correct. Okay. All right. And this found its way to me. I think Judge Lucas left -- it was taken over by Judge Overton who had to recuse herself. Welcome to Department 8.

MR. ADAM: Thank you.

THE COURT: All right, I'm advised both sides are here to address various portions of the tentative. I'm going to turn it over to the Police Officers' Association first. Mr. Adams. And then I will let the City respond.

MR. ADAM: Thank you, Your Honor. I hope to get through this in two to three minutes. We are challenging the part of the tentative ruling that says that we got to be a quo warranto to bring the MMB allegation. And we don't think that is correct. Quo warranto, Your Honor, applies when you're challenging the manner it which a charter amendment has been enacted. So it's a procedural challenge to how it was passed. And the procedural aspect is that an employer, such as the City,

when a charter amendment concerns working conditions it has to bargain before it even puts the measure on the ballot. And there is such a challenge, and we have an application pending before the Attorney General.

However, the MMB claim that's in the 7th cause of action is distinct from that. We're not challenging -- that claim does not challenge the manner in which the ballot measure was enacted. It's challenging substance of what the ballot measure says and what it would do. And what it says it would do it says that if plaintiffs here successfully defeat the retirement aspects to Measure B there would be an automatic 16 percent pay cut for City employees. We're arguing that that automatic 16 percent pay cut, if and when it happens at some point in the future, presumably after this litigation, by failing to give any ability to meet and confer about that 16 percent it flat out says it's going to be 16 percent, that, in and of itself, is a violation of MMBA.

THE COURT: Let me challenge you on that, okay? Isn't that a distinction without a difference? Because at the end of the day you're alleging a violation of the MMBA, correct?

MR. ADAM: You are --

THE COURT: The failure to meet and confer, correct?

MR. ADAM: Not in terms of how the ballot measure was enacted. In terms of --

THE COURT: I understand. I understand.

MR. ADAM: In terms of what the language would do. Your Honor, the Attorney General brought out a case in December. I have a copy that I can hand to you. They don't go by case

names. They go by numbers. It's 12203. Can I hand the Court a copy?

THE COURT: Yeah. Have you shown counsel this? Is there any objection?

MS. ROSS: Your Honor, we have not seen this before.

THE COURT: And, counsel, would you just make an offer of proof as to what it is?

MR. ADAM: Yeah, it's a new decision by the Attorney General. It deals with a quo warranto application in San Francisco where some plaintiffs tried to challenge a ballot measure there. And the Court goes into much greater detail in terms of when it's appropriate to use quo warranto and when it's not. Under that circumstance, it says the plaintiffs did not have to use quo warranto. And some of the key -- it relies on the Oakland case that the Court cited in the tentative ruling. And it gives I think a greater explanation.

THE COURT: Is this a published decision?

MR. ADAM: Yeah, a published decision. It's published December 14th, 2012.

THE COURT: Was this -- I didn't see this referenced in any of the papers.

MR. ADAM: It wasn't in the papers.

THE COURT: And here's the problem is I've got it now. They haven't had a chance to respond to it. I understand it's a new decision.

MR. ADAM: Okay.

THE COURT: But I think, in fairness, they ought to have a chance to respond.

MR. ADAM: Given the constraints in time, the suggestion the last counsel made about further briefing if appropriate. Let me read you one line from it. "It is neither necessary nor appropriate to use quo warranto procedures to litigate the question whether the substance of a particular charter amendment violates the right of certain individuals or groups." We're saying the substance of Section 1514-A violates the MMBA rights. Not the manner in which the section was enacted. It's not about how it was enacted. And quo warranto was exclusively about how it was enacted. We're challenging the substance of when the City ultimately utilizes this section to take away the 16 percent.

THE COURT: Okay. And I understand your argument. And that's the argument you made, as well, in your papers.

MR. ADAM: It is, but it wasn't as well flushed out. Obviously, there's been a lot of other questions in the papers. Again, perhaps this begs the question of further briefing on this distinct subject because it's important because if we now go to our Attorney General and ask to supplement our standing quo warranto, this is going to get kicked back and then our claim is going to find itself in no man's land.

THE COURT: Do you have an extra copy of that case?

MR. ADAM: I do, Your Honor.

THE COURT: All right. And I understand you haven't had a chance to respond. We'll deal with that in a minute. Let's keep things moving. We're running out of time here.

MS. ROSS: Your Honor, Linda Ross for City of San Jose. And we object to the late entry of this document.

There's certainly plenty of time here to have briefed this, included it in the briefing. There's even a procedure if something happens after briefing is closed for it to be submitted to the Court. And that was not followed up. So we object. And we object to any consideration of this document in connection with this case. Again, there was plenty of time for them to get it to us and to the Court. There's an avenue for this.

THE COURT: Let me make this statement regarding your objection is, I haven't seen the document yet, okay? So this is news to me. I think, at the very least -- at the very least, you should have an opportunity to respond to it, which you don't have this morning, okay? If it's published case law that is instructed to the Court in terms of the substantive law in this case, I think it makes sense for the Court to consider it, but also give you time to respond. But I don't know that yet until I take a look at it. So I think that's where I stand on this. So I'm not going to rule on your objection right now. I am going to take it under submission.

MR. ADAM: The only other --

MS. ROSS: All right. May I then address comments of counsel?

THE COURT: It sounds like you're wrapping up. And then I'll let you respond, but I'm looking at the clock.

MR. ADAM: One of the cases the defendant's rely on is the *United Public Employees* case. It's a challenge by a union to a charter amendment in San Francisco, an MMBA challenge. And there's nothing in that case about it having a quo warranto.

The Court considered the merits.

THE COURT: But I don't want you to make any further argument on this case because they can't respond to it.

MR. ADAM: This is a case -- this is the case, *The United Public Employees* case is case the defendant's relied on. It is a MMBA challenge to a charter provision in the San Francisco charter. And my point is that that case proceeded in court. It was not a quo warranto challenge. It's the same idea. Because that case didn't concern the manner in which the ballot measure was enacted, it concerned the substance of what the ballot measure said. That's the same as these --

THE COURT: I'm going to need to cut you off and let you respond.

MR. ADAM: Thank you, Your Honor.

MS. ROSS: Your Honor, the case law is clear. Quo warranto is the only remedy for the alleged violation of the MMBA in connection with a charter amendment. That is what the leading case says. That is what was recently repeated by the Attorney General in a case that -- a published decision by the Attorney General that we cited, responsively, in our brief. So there is no other remedy out there. He doesn't cite -- they don't cite any cases that provides for another remedy.

What they're trying to do is create a new cause of action. There's one cause of action under the MMBA in connection with putting a charter measure on the ballot. They're trying to create a new cause of action. They disagree with *Seal Beach*, which is the leading case on the topic. It's a California Supreme Court case. It has not been revised,

reviewed, in any way by the Court. And it stands as the law in this area, which says that --

THE COURT: I know what it says. I read it.

MS. ROSS: Right.

THE COURT: This is not -- this was set forth in your papers and it's certainly set forth in my tentative. So there's not a need to rehash that. I don't mean to be short here. I'm just trying to be effective and efficient with our time. Let's move on to the next aspect of the motion that you want to direct the Court's attention to.

MS. ROSS: What we'd like to argue is that, yes, we agree with the tentative. The tentative should be confirmed by the Court. The tentative also says with leave to amend. We don't see any basis for them to be able to amend their complaint to get out of quo warranto being the exclusive remedy. In some footnotes they say we want to amend that not only is this a question of higher contribution rates, it's potentially a question of lower wages. But that does not take you out of quo warranto. The *International Fire Fighters* case specifically discussed both pension matters, and salary matters, as matters that had to be pursued through a quo warranto action.

THE COURT: All right. Let's keep moving. Is there a portion of the tentative that you want to address in terms of the Court's decision on other issues?

MS. ROSS: Yes. Ms. Nock is going to address the other issues.

THE COURT: All right.

MS. NOCK: Yes, Your Honor. With regard to the motion

for judgment on the pleadings against AFSCME and the San Jose POA, we just wanted to address the denial, the tentative denial for the right to petition claims, the rightness claims and the Bane Act. Just very briefly, with the right to petition there's no legal authority to find, and this is the savings clause that they're challenging, to find that the City can't obtain funds through Measure B. They're basically saying that the City can't use its authority given to it by the Constitution of California to do its budget, to find other sources of funds and to address compensation.

So the savings clause says, and the text is, it doesn't say if you file a lawsuit you will -- you will -- and you win or you lose you will suffer a pay decrease. It basically says if the City doesn't get the savings that are anticipated from the first option of Measure B, the first way, then the City can exercise its authority to decrease compensation up to a maximum of 16 percent of pay. But it's not every year. The text speaks for itself.

So there's no case which where the first -- where the right to petition is used as a weapon to prevent the City from exercising its constitutional power to effect compensation.

THE COURT: Well, the issue I had was that if one aspect of that language is challenged and deemed illegal or unconstitutional, it almost, the way it's written, defaults to the next language. So, in essence, aren't you restricting the right to really petition? Because if they petition and challenge the constitutionality of the first cost of savings methodology, then doesn't the second one automatically kick in?

MS. NOCK: Well, no. First -- well, there's two answers to that. First says -- the text says to the maximum extent permitted by law, an equivalent amount of savings shall be obtained through pay reductions. The City Council, the City voters, they have the right to do that for any reason. With regard to chilling assets to the Court, there's case law that talks about where you go through this analysis of an incidental, which this would be. This wasn't intended to restrict access to the courts. So if there was an incidental chilling, although we have a lot of lawsuits, so it didn't actually chill anyone, then you have to look at the public interests and see if that, in providing government services, and seeing if that outweighs the right. And we cited cases in our brief, *Renders versus Tacoma* where they did that weighing balance. And the *Vargas* California case.

THE COURT: Again, I've got a full courtroom here and I've got more cases to call, so I don't want to go back through what the brief is. Again, I think this case in the future, perhaps, we need to think about specially setting it to allot the amount of time. I know everybody is going to walk out of here dissatisfied they didn't get a full time to be heard. But the standard of judgment of the pleadings, just for the benefit of you so you know where the Court's coming from, which the Court has to apply, the Court felt that -- I understand and accept, at some level, what you're proposing to the Court. But at the end of the day you're asking the Court to really strike this cause of action.

And I think the practical effect is what I said it was

earlier, which it does arguably restrict or inhibit the right to petition by defaulting to another cost-saving methodology, or at least that's certainly an argument that can be made that defeats the standard.

MS. NOCK: All right, so going forward we can argue on the merits then the Court would address that on full on merits with the weighing and balance?

THE COURT: Right.

MS. NOCK: With regard to the ripeness. And I think the -- all the cases, they have basic core claims, vested rights, due process, contractual impairment. And the cause of action in this motion we're really just sort of on the periphery and sort of unintended consequences of these -- unintended consequences of this right to petition, where using the right to petition to basically handcuff a government entity to do their constitutional authority, their power, is a bad result. Again, the ripeness for the Pension Protection Act and the separation of powers, neither --

THE COURT: These causes of action --

MS. ROSS: AFSCME's 5th cause of action is a Pension Protection Act.

THE COURT: Right.

MS. NOCK: The City Council has passed an ordinance, and it's about today to pass a second ordinance, saying the Pension Protection Act prevails. There's no conflict. There's no conflict. There's no controversy here. We agree the Pension Protection Act is the constitutional law of the land. And we think that -- as the Court reviews charters and the

constitution, we reconciled. We think we can reconcile them. In the event there is a conflict, the City Council has said, yes, the Pension Protect Act prevails. There is no controversy for the Court to decide. With regard to separation --

THE COURT: Except it's in litigation now. It hasn't been applied. I understand your point. But there's an as in applied standard, isn't there?

MS. NOCK: Well, right now it's a facial challenge. It hasn't been applied.

THE COURT: Well, I don't know that that's true. There is a facial challenge. But I think if I read in the papers there's --

MR. ADAM: Declaratory relief claims as well, Your Honor.

MS. NOCK: There's no allegation that the board has applied standards in Measure B that are, again, at all in violation of the Pension Protection Act.

THE COURT: I'll let you respond to that. Let's continue.

MS. NOCK: And, again, with the separation of powers it is completely in the future and tenuous and vague. It basically says if there's an ordinance -- there's no ordinance at issue in this case. If there's an ordinance that it's found to be invalid the City Council -- if there's no judgment, obviously, the City is going to comply. If there's a -- you know, we don't know what any judgment would be. If the judgment said severed then it would be severed. If the judgment said you will comply with the law as I stated it then the City will do

that. So this is completely in the future and vague and asking for an advisory opinion.

THE COURT: Okay. Counsel, do you want to briefly respond? And then --

MR. ADAM: Your Honor, I think counsel, again, is treading over into the merits. The question is are these claims adequately pled? I think they are. We're pleading an existing controversy to the declaratory relief action. So I think that was in line with what the Court ruled. I didn't want to --

THE COURT: But counsel's argument, if I understand it, is there's really not an actual controversy that would get apprised to a declaratory relief action.

MR. ADAM: Well, here's the controversy. This Measure B changes the manner in which the actuarial assumptions are carried out by the Retirement Board. And it also says the Retirement Board, instead of having exclusive fiduciary responsibilities to the members of the Retirement Plans, now has to have fiduciary responsibilities to the taxpayers. We have got an argument that under the California Pension Protection Act you're not simply allowed -- you cannot have those loyalties. And, so, what you're hearing from the City is we've passed two ordinances that don't infringe. But we're suggesting that there's any number of ordinances that could be passed that would infringe.

And, in fact, the very face of Measure B, to the extent it's applied on the Retirement Board, causes the split in loyalties that's simply not permitted by the Pension Reform Act.

THE COURT: Okay. All right.

MR. ADAM: And then briefly back on the quo warranto. Counsel is mischaracterizing what her MMB claims are. It's not about the manner in which the Measure B was enacted. If you look at our complaint there is nothing in our complaint challenging the manner in which it's enacted. The first --

THE COURT: Let me respectfully stop you. I don't want to go back. You've made that very clear.

MR. ADAM: Okay.

THE COURT: So there's no need to go back and reargue that.

MR. ADAM: Thank you.

THE COURT: I'm going to need to wrap this up. Is there any challenge to the Bane Act ruling in the tentative?

MS. NOCK: Yes, Your Honor. I think that, first of all, the Bane Act falls under some of the causes of action you didn't rule on.

THE COURT: Right.

MS. NOCK: I think there's a basic disagreement between the sides on what the Bane Act is. So the plaintiffs think that it's just a vehicle for getting -- for bringing the suit to court, which the courts have said that that is not the case. It is a separate statute. A separate injury. Which is why, even though it wasn't pled as a separate cause of action, even though they dumped it into every single one their constitutional causes of action, it is a cause of action that says, "Interference with a constitutional right with --," and this is the big difference -- "-- with intimidation, coercion or threats." It doesn't apply to a type of case like this. It's

one of those other novel theories.

THE COURT: As I understand it, it's integrated, like you said, several causes of action. And I think the Court tentative, if I recall correctly, essentially concluded that you -- judgment on the pleadings where you are attacking a particular cause of action you can't, for purposes of seeking an order granting a demurrer or seek a judgment on the pleadings as to part of the cause of action. So, ultimately, you may be absolutely right. But the legal standard the Court applied today, with respect to that, I think prevents the Court from striking that complete cause of action. If that's helpful to you.

MS. NOCK: That's helpful. And if I may respond to that? The Pension Protection Act, you took judicial notice. So when you review it, just -- 3.28.350, it said it incorporates, consistent with the constitutional code. It repeats it and it says the board shall discharge its duties. And it says in the text, the constitution, right in the ordinance.

THE COURT: Okay. I have to wrap this up. I apologize for this. I know everybody wants to talk. But, as you can see, there is a lot of people in the courtroom that want to be heard too. I am going to ask you to just briefly wrap it up and then I have to submit it.

MR. PATERSON: Your Honor, this is Teague Paterson. Would AFSCME be permitted to argue?

THE COURT: I am going to wrap it up. That's the bottom line. I don't have the benefit of time here. I appreciate that everybody wants to argue. We just don't have

the time right now to do it.

MR. PATERSON: Respectfully, Your Honor, there was one cause of action in AFSCME's complaint that you granted the motion without leave to amend. So it hasn't actually been addressed yet today.

THE COURT: And did you provide notice that you were going to be challenging that today?

MR. PATERSON: Yes, I believe so, Your Honor.

THE COURT: Okay. All right. Let's take that up now.

MR. PATERSON: Well, Your Honor, the cause of action is the bill of attainder cause of action. It wasn't clear to me, Your Honor, the exact basis for denying it. So I would like to try and be as pinpointed as I can. But I'm not exactly sure what Your Honor would be most interested in, in hearing our argument.

THE COURT: This is the bill of attainder cause of action. It's the -- I think it's the second cause of action. And it's -- essentially relates to the punitive nature, was there an intent to punish. And I think clearly the analysis was -- I'm just looking right now at my tentative so that I can direct -- yeah, essentially the conclusion was that there was nothing in Measure B itself or any legislative history that the plaintiff could point to that would evidence an intent to punish. And that was the basis for the decision.

MR. PATERSON: Well, Your Honor, if I may? Again, this is Teague Paterson. I think that that is essentially a factual issue. And the reason is because in these bills of attainder cases, and in other cases, courts don't look to the --

just the legislation itself. They look to the whole milieu that the legislative process was taking place. And, so, I'm not sure, Your Honor, that it's appropriate at the pleading stage where we have alleged an intent to punish.

So, for example, Your Honor, in *Parr versus Municipal Court*, a 1971 case at 3 Cal.3d 861, the Court said that we may not blind ourselves to official pronouncements of a hostile and discriminatory purpose solely because the ordinance employs facially neutral language. Another case, in bill of attainder case like in *Alpha Standard Investment Co.* versus *County of Los Angeles*, a 1981 case found at 118 Cal.App.3d 185, the Court said that conceding that the matter in which an ordinance is drafted is not dispositive of the issue whether it is an attainder and that the legislation, fair upon its face, may yet fall within the constitutional prescription against such bills.

And even in *U.S. v. Lovett*, that's a Supreme Court case that both parties cited, Your Honor. A 1946 case at 328 U.S. 303. The Court said that the sections language, as well as the circumstances of its passage, which we have just described, showed that no mere question of compensation procedure or of appropriation was involved. But that it was designed to force the employing agencies to discharge respondents.

So, Your Honor, my point is that in our view, and we attended the City Hall meetings and we've read the op heads, and in our view there was an intent to punish. And, specifically, the intent to punish was, and actually is, aimed at those who are refusing to give up what we regard as their constitutional protected right to certain pension.

THE COURT: Okay. And I think you did a good job of outlining that in your brief. I did consider those arguments. And I did take a look at the legal standards. And, with all due respect, I think my tentative does contemplate all that. I have to wrap it up, okay? I have to. So here's what I'm going to do is I'm going to reflect on the arguments presented today. I'm, particularly with respect to the quo warranto, I am going to take a look at this. Make a determination if that's any type of authority that the Court will need to consider. If that's the case, I'm going to give you an opportunity to respond and we'll reset it for another time.

MS. ROSS: Your Honor, just quickly. I have now had a chance to look at it and there is absolutely nothing new in the AG opinion. All it says is if you are claiming that your rights are violated, like they're claiming their vested rights are violated, that's a separate cause of action. There's no argument as to that. I really question why they even brought this here today.

THE COURT: I don't know. I just got handed it this morning. I haven't had a chance to look. Look, I appreciate your patience with this. In the future we're going to specially set these cases to give everyone a fair opportunity to be heard on these issues. It's just difficult do it on a typical nine o'clock Tuesday law and motion. I thank you for your patience. I will reflect on what was presented today. I will get my order out, okay?

MR. ADAM: Thank you, Your Honor.

MR. PATERSON: Thank you, Your Honor.

THE COURT: All right.

MR. LEIDERMAN: Thank you, Your Honor.

(Whereupon, this matter concluded.)

---oOo---

STATE OF CALIFORNIA)
) ss.
COUNTY OF SANTA CLARA)

I, MELISSA CRAWFORD, HEREBY CERTIFY:

That I was the duly appointed, qualified shorthand reporter of said court in the above-entitled action taken on the above-entitled date; that I reported the same in machine shorthand and thereafter had the same transcribed through computer-aided transcription as herein appears; and that the foregoing typewritten pages contain a true and correct transcript of the proceedings had in said matter at said time and place to the best of my ability.

I further certify that I have complied with CCP 237(a)(2) in that all personal juror identifying information has been redacted, if applicable.

DATED: FEBRUARY 15, 2013

_____

MELISSA CRAWFORD, CSR, RPR
CSR No. 12288

ATTENTION:
CALIFORNIA GOVERNMENT CODE
SECTION 69954(D) STATES:

"ANY COURT, PARTY, OR PERSON WHO HAS PURCHASED A TRANSCRIPT MAY, WITHOUT PAYING A FURTHER FEE TO THE REPORTER, REPRODUCE A COPY OR PORTION THEREOF AS AN EXHIBIT PURSUANT TO COURT ORDER OR RULE, OR FOR INTERNAL USE, BUT SHALL NOT OTHERWISE PROVIDE OR SELL A COPY OR COPIES TO ANY OTHER PARTY OR PERSON."

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SANTA CLARA

SAN JOSE POLICE OFFICERS' ASSOCIATION, Plaintiff, vs. CITY OF SAN JOSE, et al., Defendants. AND CONSOLIDATED ACTIONS AND RELATED CROSS-COMPLAINT.	Case No. 1-12-CV-225926 (Consolidated with 1-12-CV-225928, 1-12-CV-226570, 1-12-CV-226574, and 1-12-CV-227864) ORDER RE: MOTIONS FOR JUDGMENT ON THE PLEADINGS

The (1) motion for judgment on the pleadings as to the San Jose Police Officers' Association's seventh cause of action for violation of the Meyers-Milias-Brown Act by defendant City of San Jose; and (2) motion for judgment on the pleadings by City of San Jose came on for hearing before the Honorable Peter H. Kirwan on January 29, 2013, at 9:00 a.m. in Department 8. The matters having been submitted, the court orders as follows:

Defendant's request for judicial notice in support of motion for judgment on the pleadings as to the San Jose Police Officers' Association's seventh cause of action for violation of the Meyers-Milias-Brown Act, exhibit A, is GRANTED. (See Evid. Code §452, subds. (b) – (c); see also *Trinity Park, L.P. v. City of Sunnyvale* (2011) 193 Cal.App.4th 1014, 1027.) Defendant's request for judicial notice in support of motion for judgment on the pleadings as to the San Jose Police Officers' Association's seventh cause of action for violation of the Meyers-Milias-Brown Act, exhibits B – F, is DENIED.

Defendant City of San Jose's motion for judgment on the pleadings as to the San Jose Police Officers' Association's seventh cause of action for violation of the Meyers-Milias-Brown Act is GRANTED WITHOUT LEAVE TO AMEND. "[A]n action in the nature of *quo warranto* constitutes the exclusive method for appellants to mount their attack on the charter amendments based upon the city's failure to comply with the Meyers-Milias-Brown Act." (*International Assn. of Fire Fighters v. City of Oakland* (1985) 174 Cal.App.3d 687, 698; see also 95 Ops.Cal.Atty.Gen. 31.) Plaintiff San Jose Police Officers' Association argued that the seventh cause of action alleges a ***substantive*** violation of the Meyers-Milias-Brown Act and hence, *quo warranto* is not the exclusive method of attack. This court respectfully disagrees and finds the seventh cause of action alleges a ***procedural*** violation of the Meyers-Milias-Brown Act, both ripe and unripe.

-----oOo-----

Defendant's request for judicial notice in support of motion for judgment on the pleadings by the City of San Jose, exhibits A – B, is GRANTED. (See Evid. Code §452, subds. (b) – (c); see also *Trinity Park, L.P. v. City of Sunnyvale* (2011) 193 Cal.App.4th 1014, 1027.)

Plaintiff AFSCME Local 101's request for judicial notice in support of opposition to motion for judgment on the pleadings by City of San Jose is GRANTED. To the extent the request for judicial notice is granted, the court takes judicial notice of the existence of the documents, not necessarily the truth of any matters asserted therein. (See Evid. Code, §452, subd. (d); *People v. Woodell* (1998) 17 Cal.4th 448, 455.)

Defendant City of San Jose's motion for judgment on the pleadings as to the second cause of action in plaintiff AFSCME Local 101's complaint is GRANTED with 10 days' leave to amend.

Defendant City of San Jose's motion for judgment on the pleadings as to the sixth cause of action in plaintiff AFSCME Local 101's complaint and the fourth cause of action in plaintiff San Jose Police Officers' Association's first amended complaint is DENIED.

Defendant City of San Jose's motion for judgment on the pleadings as to the seventh cause of action in plaintiff AFSCME Local 101's complaint is GRANTED with 10 days' leave to amend.

Defendant City of San Jose's motion for judgment on the pleadings as to the first through seventh causes of action in plaintiff AFSCME Local 101's complaint and the first through fifth and eighth causes of action in plaintiff San Jose Police Officers' Association's first amended complaint is DENIED. A defendant cannot demur (or, similarly, move for judgment on the pleadings) to a portion of a cause of action. (See *Financial Corp. of America v. Wilburn* (1987) 189 Cal.App.3d 764, 778—"[A] defendant cannot demur generally to part of a cause of action;" see also *PH II, Inc. v. Superior Court* (1995) 33 Cal.App.4th 1680, 1682—"A demurrer does not lie to a portion of a cause of action.") Defendant City of San Jose's alternative motion to strike portions of the first through seventh causes of action in plaintiff AFSCME Local 101's complaint and portions of the first through fifth and eighth causes of action in plaintiff San Jose Police Officers' Association's first amended complaint is DENIED.

Defendant City of San Jose's motion for judgment on the pleadings as to the fifth cause of action of AFSCME Local 101's complaint and eighth cause of action of San Jose Police Officers' Association's first amended complaint is DENIED.

Defendant City of San Jose's motion for judgment on the pleadings as to the fifth cause of action of San Jose Police Officers' Association's first amended complaint is DENIED.

Dated: 1/31/13

Hon. Peter H. Kirwan
Judge of the Superior Court

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SANTA CLARA
191 N. First Street
San Jose, CA 95113-1090

FILED
FEB - 1 2013
DAVID H. YAMASAKI
Chief Executive Officer
Superior Court of California, County of Santa Clara
BY Ingrid Stewart

TO: FILE COPY

RE: San Jose Police Officers' Association vs City Of San Jose
Case Nbr: 1-12-CV-225926

PROOF OF SERVICE

ORDER RE:MOTIONS FOR JUDGMENT ON THE PLEADINGS

was delivered to the parties listed below in the above entitled case as set forth in the sworn declaration below.

Parties/Attorneys of Record:

CC: Teague P. Paterson , Beeson Tayer & Bodine
483 Ninth Street, Suite 200, Oakland, CA 94607
Jonathan Yank , Carroll Burdick & McDonough LLP
44 Montgomery Street, Suite 400, San Francisco, CA 94104
Christopher E. Platten , Wylie McBride Platten & Renner
2125 Canoas Garden Avenue, Suite 120, San Jose, CA 95125-2124
Arthur A Hartinger , Meyers Nave Riback Silver Et Al
555 12th Street, Suite 1500, Oakland, CA 94607
Harvey L. Leiderman , Reed Smith LLP
101 Second Street, Suite 1800, San Francisco, CA 94105-3659

If you, a party represented by you, or a witness to be called on behalf of that party need an accommodation under the American with Disabilities Act, please contact the Court Administrator's office at (408)882-2700, or use the Court's TDD line, (408)882-2690 or the Voice/TDD California Relay Service, (800)735-2922.

DECLARATION OF SERVICE BY MAIL: I declare that I served this notice by enclosing a true copy in a sealed envelope, addressed to each person whose name is shown above, and by depositing the envelope with postage fully prepaid, in the United States Mail at San Jose, CA on 02/01/13. DAVID H. YAMASAKI, Chief Executive Officer/Clerk by Ingrid C Stewart, Deputy

CBM CARROLL, BURDICK & McDONOUGH LLP

February 5, 2013

Carroll, Burdick & McDonough LLP
44 Montgomery Street
Suite 400
San Francisco, CA
94104-4606

415.989.5900
415.989.0932 Fax
www.cbmlaw.com

Los Angeles
Sacramento

Gregg McLean Adam
Direct Dial: 415.743.2534
gadam@cbmlaw.com

VIA UPS OVERNIGHT

Marc J. Nolan
Deputy Attorney General
Department of Justice
300 South Spring Street, Suite 1702
Los Angeles, CA 90013

Re: Request for Opinion in *Quo Warranto* Application in *San Jose Police Officers' Association v. City of San Jose, et al.*, Your File No. LA2012106837 CBM File No. 038809/038781

Dear Mr. Nolan:

We represent San Jose Police Officers' Association ("SJPOA") in the above-captioned application. Given the recent adverse trial court ruling described below, we respectfully ask the Attorney General to issue an opinion letter **before February 15, 2013** confirming that SJPOA's challenges to the substantive legality of the City of San Jose's Measure B does not fall within the purview of *quo warranto.*

As you know, SJPOA mounted two challenges to Measure B, a charter amendment SJPOA contends deprives its members of certain vested retirement rights.

On June 21, 2012, SJPOA submitted to this office its *quo warranto* application seeking the Attorney General's permission to sue the City of San Jose. That application detailed how the City failed to satisfy its procedural meet-and-confer duties under the Meyers-Milias-Brown Act ("MMBA") *before* placing Measure B on the ballot.

SJPOA also filed a lawsuit in state court *after* Measure B was enacted alleging the substance of the charter amendments themselves violated the MMBA. In particular, the complaint alleged Measure B violated the MMBA's meet and confer duties because it allowed unilateral changes to the terms and conditions of employment—specifically a 16% pay cut if Measure B's pension changes are declared invalid. That complaint does ***not*** challenge the method by which Measure B was placed on the ballot. On February 1, 2013, the superior court dismissed SJPOA's MMBA cause of action *with prejudice* based

on its ruling that *quo warranto* was the exclusive method to challenge charter amendments under the MMBA. (See attached.)

SJPOA disagrees with the trial court's ruling because the complaint does *not* challenge the manner in which Measure B was put on the ballot (which squarely falls within *quo warranto* and is the subject of SJPOA's application lodged with the Attorney General), but rather challenges the *substantive legality* of the new charter sections as implemented by the City.

SJPOA thus respectfully requests the Attorney General issue an opinion letter—***before February 15, 2013***—confirming that SJPOA's substantive challenges to Measure B do not fall within and need not be brought in *quo warranto*. SJPOA will then seek reconsideration of the trial court's ruling based, in part, on that letter. Alternatively, if the Attorney General does not issue such an opinion letter, SJPOA will be compelled to file a petition for writ of mandate with the Court of Appeal.

If that writ is denied, SJPOA's challenges to the substantive legality of Measure B will be in a procedural limbo—a fundamentally unfair result given the limited scope of a *quo warranto* action and the inapplicability of that procedure to SJPOA's challenges to the substantive legality of Measure B. SJPOA would thus be caught in the untenable position of being barred from California courts in its attempt to enforce the vested rights of its members, *i.e.*, it would have a right without a remedy.

Given the pressing nature of this matter, please contact me at your earliest opportunity if you have any questions.

Very truly yours,

CARROLL, BURDICK & McDONOUGH LLP

Gregg McLean Adam

GMA:GCM:jo
Enclosure
cc: Kamala D. Harris, Attorney General
Arthur A. Hartinger, Esq., Meyers, Nave, Riback, Silver & Wilson
Counsel for City of San Jose in state court action
Jonathan V. Holtzman, Esq., Renne Sloan Holtzman & Sakai LLP
Counsel for City of San Joe in *quo warranto* application
Jim Unland, President, San Jose Police Officers' Association

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SANTA CLARA

SAN JOSE POLICE OFFICERS' ASSOCIATION, Plaintiff, vs. CITY OF SAN JOSE, et al., Defendants. AND CONSOLIDATED ACTIONS AND RELATED CROSS-COMPLAINT.	Case No. 1-12-CV-225926 (Consolidated with 1-12-CV-225928, 1-12-CV-226570, 1-12-CV-226574, and 1-12-CV-227864) ORDER RE: MOTIONS FOR JUDGMENT ON THE PLEADINGS

The (1) motion for judgment on the pleadings as to the San Jose Police Officers' Association's seventh cause of action for violation of the Meyers-Milias-Brown Act by defendant City of San Jose; and (2) motion for judgment on the pleadings by City of San Jose came on for hearing before the Honorable Peter H. Kirwan on January 29, 2013, at 9:00 a.m. in Department 8. The matters having been submitted, the court orders as follows:

Defendant's request for judicial notice in support of motion for judgment on the pleadings as to the San Jose Police Officers' Association's seventh cause of action for violation of the Meyers-Milias-Brown Act, exhibit A, is GRANTED. (See Evid. Code §452, subds. (b) – (c); see also *Trinity Park, L.P. v. City of Sunnyvale* (2011) 193 Cal.App.4th 1014, 1027.) Defendant's request for judicial notice in support of motion for judgment on the pleadings as to the San Jose Police Officers' Association's seventh cause of action for violation of the Meyers-Milias-Brown Act, exhibits B – F, is DENIED.

Defendant City of San Jose's motion for judgment on the pleadings as to the San Jose Police Officers' Association's seventh cause of action for violation of the Meyers-Milias-Brown Act is GRANTED WITHOUT LEAVE TO AMEND. "[A]n action in the nature of *quo warranto* constitutes the exclusive method for appellants to mount their attack on the charter amendments based upon the city's failure to comply with the Meyers-Milias-Brown Act." (*International Assn. of Fire Fighters v. City of Oakland* (1985) 174 Cal.App.3d 687, 698; see also 95 Ops.Cal.Atty.Gen. 31.) Plaintiff San Jose Police Officers' Association argued that the seventh cause of action alleges a ***substantive*** violation of the Meyers-Milias-Brown Act and hence, *quo warranto* is not the exclusive method of attack. This court respectfully disagrees and finds the seventh cause of action alleges a ***procedural*** violation of the Meyers-Milias-Brown Act, both ripe and unripe.

-----oOo-----

Defendant's request for judicial notice in support of motion for judgment on the pleadings by the City of San Jose, exhibits A – B, is GRANTED. (See Evid. Code §452, subds. (b) – (c); see also *Trinity Park, L.P. v. City of Sunnyvale* (2011) 193 Cal.App.4th 1014, 1027.)

Plaintiff AFSCME Local 101's request for judicial notice in support of opposition to motion for judgment on the pleadings by City of San Jose is GRANTED. To the extent the request for judicial notice is granted, the court takes judicial notice of the existence of the documents, not necessarily the truth of any matters asserted therein. (See Evid. Code, §452, subd. (d); *People v. Woodell* (1998) 17 Cal.4th 448, 455.)

Defendant City of San Jose's motion for judgment on the pleadings as to the second cause of action in plaintiff AFSCME Local 101's complaint is GRANTED with 10 days' leave to amend.

Defendant City of San Jose's motion for judgment on the pleadings as to the sixth cause of action in plaintiff AFSCME Local 101's complaint and the fourth cause of action in plaintiff San Jose Police Officers' Association's first amended complaint is DENIED.

Defendant City of San Jose's motion for judgment on the pleadings as to the seventh cause of action in plaintiff AFSCME Local 101's complaint is GRANTED with 10 days' leave to amend.

Defendant City of San Jose's motion for judgment on the pleadings as to the first through seventh causes of action in plaintiff AFSCME Local 101's complaint and the first through fifth and eighth causes of action in plaintiff San Jose Police Officers' Association's first amended complaint is DENIED. A defendant cannot demur (or, similarly, move for judgment on the pleadings) to a portion of a cause of action. (See *Financial Corp. of America v. Wilburn* (1987) 189 Cal.App.3d 764, 778—"[A] defendant cannot demur generally to part of a cause of action;" see also *PH II, Inc. v. Superior Court* (1995) 33 Cal.App.4th 1680, 1682—"A demurrer does not lie to a portion of a cause of action.") Defendant City of San Jose's alternative motion to strike portions of the first through seventh causes of action in plaintiff AFSCME Local 101's complaint and portions of the first through fifth and eighth causes of action in plaintiff San Jose Police Officers' Association's first amended complaint is DENIED.

Defendant City of San Jose's motion for judgment on the pleadings as to the fifth cause of action of AFSCME Local 101's complaint and eighth cause of action of San Jose Police Officers' Association's first amended complaint is DENIED.

Defendant City of San Jose's motion for judgment on the pleadings as to the fifth cause of action of San Jose Police Officers' Association's first amended complaint is DENIED.

Dated: 1/31/13

Hon. Peter H. Kirwan
Judge of the Superior Court

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SANTA CLARA
191 N. First Street
San Jose, CA 95113-1090

FILED
FEB - 1 2013
DAVID H. YAMASAKI
Chief Executive Officer
Superior Court of California
BY Ingrid Stewart

TO: FILE COPY

,

RE: San Jose Police Officers' Association vs City Of San Jose
Case Nbr: 1-12-CV-225926

PROOF OF SERVICE

ORDER RE:MOTIONS FOR JUDGMENT ON THE PLEADINGS

was delivered to the parties listed below in the above entitled case as set forth in the sworn declaration below.

Parties/Attorneys of Record:

CC: Teague P. Paterson , Beeson Tayer & Bodine
483 Ninth Street, Suite 200, Oakland, CA 94607
Jonathan Yank , Carroll Burdick & McDonough LLP
44 Montgomery Street, Suite 400, San Francisco, CA 94104
Christopher E. Platten , Wylie McBride Platten & Renner
2125 Canoas Garden Avenue, Suite 120, San Jose, CA 95125-2124
Arthur A Hartinger , Meyers Nave Riback Silver Et Al
555 12th Street, Suite 1500, Oakland, CA 94607
Harvey L. Leiderman , Reed Smith LLP
101 Second Street, Suite 1800, San Francisco, CA 94105-3659

If you, a party represented by you, or a witness to be called on behalf of that party need an accommodation under the American with Disabilities Act, please contact the Court Administrator's office at (408)882-2700, or use the Court's TDD line, (408)882-2690 or the Voice/TDD California Relay Service, (800)735-2922.

DECLARATION OF SERVICE BY MAIL: I declare that I served this notice by enclosing a true copy in a sealed envelope, addressed to each person whose name is shown above, and by depositing the envelope with postage fully prepaid, in the United States Mail at San Jose, CA on 02/01/13. DAVID H. YAMASAKI, Chief Executive Officer/Clerk by Ingrid C Stewart, Deputy

Renne Sloan Holtzman Sakai
Public Law Group™
350 Sansome Street, Suite 300
San Francisco, CA 94104
t: 415.678.3800
f: 415.678.3838

February 12, 2013

DAVID KAHN
dkahn@publiclawgroup.com
(415) 678-3810

VIA FEDERAL EXPRESS

Marc J. Nolan
Deputy Attorney General
Department of Justice
300 South Spring Street, Suite 1702
Los Angeles, CA 90013

Re: Request for Opinion in *Quo Warranto* Application in *San Jose Police Officers Association v. City of San Jose, et al.*
Your File No. LA2012106837

Dear Mr. Nolan:

We write in response to a letter dated February 5, 2013 from Gregg Adam, counsel for the San Jose Police Officers' Association ("SJPOA") in the matter identified above. Mr. Adam requests that the Attorney General issue an advisory opinion to the San Jose Superior Court in connection with the case entitled *San Jose Police Officers' Association v. City of San Jose et al.* (No. 1-12-CV-225926). Specifically, Mr. Adam requests that the requested advisory opinion "confirm[] that SJPOA's substantive challenges to Measure B do not fall within and need not be brought in quo warranto." For a number of independent reasons, the Attorney General should decline Mr. Adam's highly unusual and legally unwarranted request for an advisory opinion regarding a case in which the Attorney General has never appeared, and involving a matter regarding which the Superior Court has already issued its ruling.

First, as a threshold matter, there is no legal authority whatsoever for the issuance of the advisory opinion sought by Mr. Adam. No statute or rule of court authorizes the Attorney General to gratuitously advise a superior court regarding a ruling that court has issued in pending litigation to which the State of California is not a party, and in which the Attorney General has never appeared. On this ground alone, the Attorney General should decline Mr. Adam's invitation to become embroiled in this complex and nuanced litigation, without the benefit of any background in the case.

Second, the Government Code section 12519 carefully circumscribes who may obtain an opinion from the Attorney General. Mr. Adam's client is not among those persons identified in section 12519.[1]

Third, Mr. Adam's reading of the Superior Court's ruling is plainly incorrect. Contrary to Mr. Adam's characterization of the Court's February 1 order, the Court did not rule that quo warranto relief extends to the substantive validity of a charter provision. Rather, in construing SJPOA's complaint, the Court simply concluded that the SJPOA's seventh cause of action "alleges a procedural violation of the Meyers-Milias-Brown Act . . . ." The Court has not requested, and is in no need of, an advisory opinion regarding this matter.

Finally, Mr. Adam's claim that SJPOA is in a "procedural limbo" rings hollow. The SJPOA chose the causes of action it sought to advance in the litigation, and framed those causes of action for the Court. If it is dissatisfied with the Court's decision, it can pursue its further judicial remedies in the same manner as any other litigant. Further, there are a variety of additional causes of action – all of which also challenge San Jose's Measure B – that are being actively litigated on the merits.

Thank you for considering our views in this matter.

Very truly yours,

David E. Kahn

DK:zc

cc: Kamala Harris, Attorney General (via Federal Express)
Arthur A. Hartinger, Esq. (via email)
Gregg Adam, Esq. (via email)
Alex Gurza, City of San Jose (via email)

---

[1] Indeed, the Attorney General's website emphasizes this limitation:

> The California Constitution and state law designate the state and local public officers who may request a legal opinion from the Attorney General on any question of law relating to their respective offices. However, this does not authorize a designated officer to request an opinion on a question posed by someone else. A request will be declined when it is apparent that the request is made on behalf of someone not authorized by Government Code section 12519. (http://oag.ca.gov/opinions/faqs)

KAMALA D. HARRIS
Attorney General

State of California
DEPARTMENT OF JUSTICE

300 SOUTH SPRING STREET, SUITE 1702
LOS ANGELES, CA 90013

Public: (213) 897-2000
Telephone: (213) 897-2255
Facsimile: (213) 897-7605
E-Mail: Marc.Nolan@doj.ca.gov

February 14, 2013

Via e-mail and U.S. Mail

Gregg McLean Adam, Esq.
Carroll, Burdick & McDonough, LLP
44 Montgomery Street, Suite 400
San Francisco, California 94104
gadam@cbmlaw.com

David E. Kahn, Esq.
Renne Sloan Holtzman Sakai LLP
350 Sansome Street, Suite 300
San Francisco, California 94104
dkahn@publiclawgroup.com

RE: Quo warranto application in *San Jose Police Officers Assn. v. City of San Jose* (Opinion No. 12-605; Our File No. LA2013106837)

Dear Counsel:

We have received and considered the request, dated February 5, 2013, from counsel for the San Jose Police Officers' Association (SJPOA) for an opinion letter from this office regarding a legal issue recently ruled upon by the Santa Clara Superior Court in civil litigation between the two parties—i.e., SJPOA and the City of San Jose (City)—also involved in the above-entitled quo warranto matter. Specifically, we have been asked to "confirm" that a given legal claim pressed by the SJPOA in the civil lawsuit, and denied by the superior court, "does not fall within the purview of *quo warranto*." We have also read and considered the City's opposition, dated February 12, 2013, to SJPOA's request.

As you know, the issues presented in the proposed quo warranto action now under our consideration involve the events surrounding the process by which the voter initiative known as "Measure B" was enacted and whether there were procedural irregularities in that process. As it has been described to us, the issue ruled upon by the superior court involves the legal effect, *post-enactment*, of a particular provision of Measure B. That issue is therefore separate and distinct from the matters before us.

It is the policy of this office to deny requests to provide legal opinions on questions that are pending before a court,[1] and counsel for SJPOA informs us that SJPOA may either seek reconsideration or appellate writ review of the superior court ruling in question. In any event, this office only provides legal opinions to those authorized to request and receive them under

[1] *See* http://oag.ca.gov/opinions/faqs.

Government Code section 12519.[2] Consequently, we must decline to provide the requested opinion letter.

Sincerely,

MARC J. NOLAN
Deputy Attorney General

For KAMALA D. HARRIS
Attorney General

MJN:al

LA2012106837
Letter to Counsel (02.14.13)

[2] This section provides:

The Attorney General shall give his or her opinion in writing to any Member of the Legislature, the Governor, Lieutenant Governor, Secretary of State, Controller, Treasurer, State Lands Commission, Superintendent of Public Instruction, Insurance Commissioner, any state agency, and any county counsel, district attorney, or sheriff when requested, upon any question of law relating to their respective offices.

The Attorney General shall give his or her opinion in writing to a city prosecuting attorney when requested, upon any question of law relating to criminal matters.

PROOF OF SERVICE BY UPS – NEXT DAY AIR

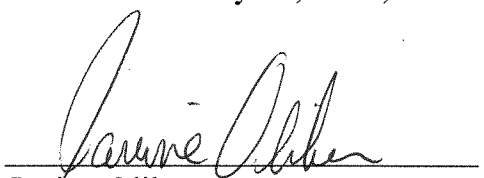
I declare that I am employed in the County of San Francisco, California. I am over the age of eighteen years and not a party to the within cause; my business address is 44 Montgomery Street, Suite 400, San Francisco, CA 94104. On February 22, 2013, I served the enclosed:

PETITION FOR WRIT OF MANDATE, PROHIBITION, OR OTHER APPROPRIATE RELIEF; AND SUPPORTING EXHIBITS

on the parties in said cause (listed below) by enclosing a true copy thereof in a prepaid sealed package, addressed with appropriate United Parcel Service shipment label and, following ordinary business practices, said package was placed for collection (in the offices of Carroll, Burdick & McDonough LLP) in the appropriate place for items to be collected and delivered to a facility regularly maintained by United Parcel Service. I am readily familiar with the Firm's practice for collection and processing of items for overnight delivery with United Parcel Service and that said package was delivered to United Parcel Service in the ordinary course of business on the same day.

Hon. Peter H. Kirwan Department 8 Santa Clara County Superior Court 191 N. First Street San Jose, CA 95113	*Respondent*
Arthur A. Hartinger, Esq. Linda M. Ross, Esq. Jennifer L. Nock, Esq. Michael C. Hughes, Esq. Meyers, Nave, Riback, Silver & Wilson 555 12th Street, Suite 1500 Oakland, CA 94607 Phone: (510) 808-2000 Fax: (510) 444-1108 Email: lross@meyersnave.com	*Counsel for Real Party in Interest*

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed on February 22, 2013, at San Francisco, California.



Janine Oliker